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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WARNER JACKSON, *et al.*,
Petitioners,
v.
JOHN T. BENSON, *et al.*,
Respondents.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
Petitioners,
v.
JOHN T. BENSON, *et al.*,
Respondents.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,
v.
JOHN T. BENSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[Filed June 10, 1998]

IN SUPREME COURT
STATE OF WISCONSIN

No. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SEROTTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES AND PHILIP JONES,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction, DEPARTMENT OF PUBLIC INSTRUCTION and JAMES E. DOYLE,

Defendants-Appellants-Petitioners,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

Intervenors-Defendants-Appellants,

PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,

Intervenors-Defendants-Appellants-Petitioners.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, by its President, M. CHARLES HOWARD, MICHAEL LENGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., by its Executive Director, CARL A. GOBEL, PEOPLE FOR THE AMERICAN WAY, by its Executive Vice President and Legal Director, ELLIOTT M. MINCBERG, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN AND SALLY F. MILLS,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction, DEPARTMENT OF PUBLIC INSTRUCTION and JAMES E. DOYLE,

Defendants-Appellants-Petitioners,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

Intervenors-Defendants-Appellants,

PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER and JEANINE KNOX,

Intervenors-Defendants-Appellants-Petitioners.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, FELMERS O. CHANEY, LOIS PARKER, on behalf of herself and her minor child, RASHAN HOBBS, DERRICK D. SCOTT, on behalf of himself and his minor children, DERESIA C.A. SCOTT and DESMOND L.J. SCOTT, CONSTANCE J. CHERRY, on behalf of herself and her minor children, MONIQUE J. BRANCH, MONICA S. BRANCH, and WILLIAM A. BRANCH,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction of Wisconsin, in his official capacity,

Defendant-Appellant.

REVIEW of a decision of the Court of Appeals. *Reversed and cause remanded with directions.*

¶ 1 DONALD W. STEINMETZ, J. This case raises a number of issues for review:

(1) Does the amended Milwaukee Parental Choice Program (amended MPCP) violate the Establishment Clause of the First Amendment to the United States Constitution? Neither the court of appeals nor the circuit court reached this issue. We conclude that it does not.

(2) Does the amended MPCP violate the religious establishment provisions of Wisconsin Constitution art. I, §18? In a divided opinion, the court of appeals held that it does. We conclude that it does not.

(3) Is the amended MPCP a private or local bill enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18? The court of appeals did not reach this question, and the circuit court held it is. We conclude that it is not.

(4) Does the amended MPCP violate the uniformity provision of Wis. Const. art. X, § 3? The court of appeals did not reach this issue, and the circuit court concluded that the amended MPCP does not violate the uniformity clause. We also conclude that it does not.

(5) Does the amended MPCP violate Wisconsin's public purpose doctrine, which requires that public funds be spent only for public purposes? The court of appeals did not reach this issue, and the circuit court concluded that the amended MRCP does violate the public purpose doctrine. We conclude that it does not.

(6) Should children who were eligible for the amended MPCP when this court's injunction issued on August 25, 1995, and who subsequently enrolled in private schools, be eligible for the program if the injunction is lifted? Neither court below addressed this issue. We conclude that they should.

¶ 2 This case is before the court on petition for review of a published decision of the court of appeals, *Jackson v. Benson*, 213 Wis. 2d 1, 570 N.W.2d 407 (Ct. App. 1997). The court of appeals, in a 2-1 decision, affirmed an order of the Circuit Court for Dane County, Paul B. Higginbotham, Judge, granting the Respondents' motion for summary judgment. The majority of the court of appeals concluded that the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, as amended by 1995 Wis. Act 27, §§ 4002-4009 (amended MPCP), was invalid under ArticIe I, § 18 of the Wisconsin Constitution because it directs payments of money from the state treasury for the benefit of religious seminaries. The majority of the court of appeals declined to decide whether the amended MPCP violates the Establishment Clause of the First Amendment or other provisions of the Wisconsin Constitution. In dissent, Judge Roggensack concluded that the amended MPCP did not violate either the federal or state constitution. The State appealed from the decision of the court of appeals. We granted the State's peti-

tion for review and now reverse the decision of the court of appeals. We also conclude that the amended MPCP does not violate the Establishment Clause or the Wisconsin Constitution.

¶ 3 We are once again asked to review the constitutionality of the Milwaukee Parental Choice Program provided in Wis. Stat. § 119.23 (1995-96).[1] The Wisconsin legislature enacted the original Milwaukee Parental Choice Program (original MPCP) in 1989. *See* 1989 Wis. Act 336. As amended in 1993, the original MPCP permitted up to 1.5 percent of the student membership of the Milwaukee Public Schools (MPS) to attend at no cost to the student any private nonsectarian school located in the City of Milwaukee, subject to certain eligibility requirements.

¶ 4 Under the original MPCP, the legislature limited the students eligible for participation in the original program. To be eligible for the original MPCP, a student (1) had to be a student in kindergarten through twelfth grade; (2) had to be from a family whose income did not exceed 1.75 times the federal poverty level; and (3) had to be either enrolled in a public school in Milwaukee, attending a private school under this program, or not enrolled in school during the previous year. *See* Wis. Stat. § 119.23(2)(a)(1)-(2) (1993-94).

¶ 5 The legislature also placed a variety of qualification and reporting requirements on private schools choosing to participate in the original MPCP. To be eligible to participate in the original MPCP, a private school had to comply with the anti-discrimination provisions imposed by 42 U.S.C. § 2000d[2] and all health and safety laws or

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[1] Unless otherwise stated, all references to Wis. Stats. are to the 1995-96 version of the statutes.

[2] 42 U.S.C. § 2000d provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

codes that apply to Wisconsin public schools. *See id.* at § 119.23(2)(a)(4)-(5). The school additionally had to meet on an annual basis defined performance criteria and had to submit to the State certain financial and performance audits. *See id.* at § 119.23(7), (9).

¶ 6 Under the original MPCP, the State Superintendent of Public Instruction was required to perform a number of supervisory and reporting tasks. The legislature required the State Superintendent to submit an annual report regarding student achievement, attendance, discipline, and parental involvement for students in the program compared to students enrolled in MPS in general. *See id.* at § 119.23(5)(d). The original MPCP further required the State Superintendent to monitor the performance of students participating in the program, and it empowered him or her to conduct one or more financial and performance audits of the program. *See id.* at § 119.23(7)(b), (9)(a).

¶ 7 Under the original MPCP, the State provided public funds directly to participating private schools. For each student attending a private school under the program, the State paid to each participating private school an amount equal to the state aid per student to which MPS would have been entitled under state aid distribution formulas. *See id.* at § 119.23(4). In the 1994-95 school year, this amount was approximately $2,500 per participating student. The amount of state aid MPS received each year was reduced by the amount the State paid to private schools participating in the original program. *See id.* at § 119.23(5)(a).

¶ 8 The original MPCP withstood a number of state constitutional challenges in *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992). In *Davis*, this court first held that the original program, when enacted, was not a private or local bill and therefore was not subject to the prohibitions of Wis. Const. art. IV, § 18. *See id.* at 537. The court then held that the program did not violate the

uniformity clause in Wis. Const. art. X, § 3 because the private schools did not constitute "district schools" simply by participating in the program. *See id.* at 540. The court finally held that the program, although it applied only to MPS, served a sufficient public purpose and therefore did not violate the public purpose doctrine. *See id.* at 546.

¶ 9 During the 1994-95 school year, approximately 800 students attended approximately 12 nonsectarian private schools under the original program. For the 1995-96 school year, the number of participating students increased to approximately 1,600 and the number of participating nonsectarian private schools increased to 17.

¶ 10 In 1995, as part of the biennial budget bill, the legislature amended in a number of ways the original MPCP. *See* 1995 Wis. Act 27, §§ 4002-4009. First, the legislature removed from Wis. Stat. § 119.23(2)(a) the limitation that participating private schools be "nonsectarian." *See* 1995 Wis. Act 27, § 4002. Second, the legislature increased to 15 percent in the 1996-97 school year the total percentage of MPS membership allowed to participate in the program. *See id.* at § 4003. Third, the legislature deleted the requirement that the State Superintendent conduct annual performance evaluations and report to the legislature, and it eliminated the Superintendent's authority to conduct financial or performance evaluation audits of the program. *See id.* at §§ 4007m and 4008m.

¶ 11 Fourth, the legislature amended the original MPCP so that the State, rather than paying participating schools directly, is required to pay the aid to each participating student's parent or guardian. Under the amended MPCP, the State shall "send the check to the private school," and the parent or guardian shall "restrictively endorse the check for the use of the private school." *Id.* at § 4006m. Fifth, the amended MPCP places an additional limitation on the amount the State will pay to each parent or guardian. Under the amended MPCP, the State

will pay the lesser of the MPS per student state aid under Wis. Stat. § 121.08 or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by the State. *See id.* The amended MPCP does not restrict the uses to which the private schools can put the state aid. Sixth, the legislature repealed the limitation that no more than 65 percent of a private school's enrollment consist of program participants. *See id.* at § 4003. Finally, the legislature added an "opt-out" provision prohibiting a private school from requiring "a student attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities." *Id.* at § 4008e.[3]

¶ 12 The Respondents, Warner Jackson, et al. and Milwaukee Teachers Education Association (MTEA), et al. filed two original actions in August 1995. Together the lawsuits challenged the amended MPCP under the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. X, § 3; art. IV, § 18; and the Wisconsin public purpose doctrine. On August 15, 1996, the National Association for the Advancement of Colored People (NAACP) filed a separate lawsuit, alleging the same claims as the first two lawsuits and adding a claim that, on its face, the amended MPCP violated the Equal Protection Clause of the Fourteenth Amendment and Wis. Const. art. I, § 1. The NAACP then filed a motion to consolidate the lawsuits. The circuit court consolidated the cases, but bifurcated the proceedings so that the equal protection claims would be heard only if the amended MPCP was upheld.

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[3] The expansion of the program was set to commence in the 1995-96 school year. By the time of the injunction, more than 4,000 children previously enrolled in Milwaukee Public Schools (MPS) had applied and over 3,400 had been admitted to private schools under the amended choice program.

¶ 13 The State filed, under Wis. Stat. § (Rule) 809.70, a petition for leave to commence an original action, seeking from this court a declaration that the amended MPCP was constitutional. This court accepted original jurisdiction and entered a preliminary injunction staying the implementation of the amended program, specifying that the pre-1995 provisions of the original program were unaffected. Following oral argument, this court split three-to-three on the constitutional issues, dismissed the petition, and effectively remanded the case to the circuit court for further proceedings. *See State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (per curiam).

¶ 14 Following remand, the circuit court partially lifted the preliminary injunction, thereby allowing the State to implement all of the 1995 amendments except the amendment allowing participation by sectarian private schools. In January 1997, the circuit court granted the Plaintiffs' motions for summary judgment, denied the State's motion for summary judgment, and invalidated the amendments to the MCPC. The circuit court held that the amended MPCP violates the religious benefits and compelled support clauses of Wis. Const. art. I, § 18, the public or local bill prohibitions of Wis. Const. art. IV, § 18, and the public purpose doctrine as the program applied to sectarian schools. The circuit court also found that the amended program did not violate the uniformity clause in Wis. Const. art. X, § 3 or the public purpose doctrine as it applied to the nonsectarian private schools. Because the circuit court invalidated the amended MPCP on state constitutional grounds, the court did not address the question whether the program violates the Establishment Clause. The State appealed from the circuit court's order, and the court of appeals, with Judge Roggensack dissenting, affirmed.

¶ 15 A majority of the court of appeals held that the amended MPCP violates the prohibition against state ex-

penditures for the benefit of religious societies or seminaries contained in Wis. Const. art. I, § 18. The court of appeals, therefore, struck the amended MPCP in its entirety and found it unnecessary to reach the other state and the federal constitutional issues. The State appealed to this court, and we granted the State's petition for review.

¶ 16 In the circuit court, the Respondents challenged the amended MPCP under the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. X, § 3; art. IV, § 18; and the Wisconsin public purpose doctrine. We address each issue in turn.

¶ 17 Before we begin our analysis of the amended MPCP, we pause to clarify the issues not before this court. In their briefs and at oral argument, the parties presented information and testimony expressing positions pro and con bearing on the merits of this type of school choice program. This debate largely concerns the wisdom of the amended MPCP, its efficiency from an educational point of view, and the political considerations which motivated its adoption. We do not stop to summarize these arguments, nor to burden this opinion with an analysis of them, for they involve considerations not germane to the narrow constitutional issues presented in this case. In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process. This program may be wise or unwise, provident or improvident from an educational or public policy viewpoint. Our individual preferences, however, are not the constitutional standard.

Standard of Review

¶ 18 Procedurally, this case is before the court pursuant to the circuit court's grant of summary judgment to the Plaintiffs-Respondents. We independently review a grant of summary judgment, *see Burkes v. Klauser*, 185 Wis. 2d 308, 327, 517 N.W.2d 503 (1994), applying the same methodology as that used by the circuit court. *See*,

e.g., Kafka v. Pope, 194 Wis. 2d 234, 240, 533 N.W.2d 491 (1995); *Voss v. City of Middleton,* 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). A motion for summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Wis. Stat. § 802.08(2). The underlying issue in this case is the constitutionality of the amended MPCP. The constitutionality of a statute is a question of law which we review independently, without giving deference to the decisions of the circuit court and the court of appeals. *See State v. Post,* 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995); *State v. Migliorino,* 150 Wis. 2d 513, 524, 442 N.W.2d 36 (1989).

¶ 19 Like any other duly enacted statute, the amended MPCP enjoys a strong presumption of constitutionality. All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law. *See State v. Randall,* 192 Wis. 2d 800, 824, 532 N.W.2d 94 (1995); *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 47, 205 N.W.2d 784 (1973). Accordingly, "[it] is not enough that respondent[s] establish doubt as to act's constitutionality nor is it sufficient that respondent[s] establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt." *La Plante,* 58 Wis. 2d at 46; *see also State v. McManus,* 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989); *Quinn v. Town of Dodgeville,* 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985).

I. Establishment Clause

¶ 20 The first issue we address is whether the amended MPCP violates the Establishment Clause of the First Amendment to the United States Constitution. Neither the circuit court nor the court of appeals reached this issue. Upon review we conclude that the amended MPCP does not violate the Establishment Clause because it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive en-

tanglement between the State and participating sectarian private schools.[4]

¶ 21 The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This mandate applies equally to state legislatures by virtue of the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Holy Trinity Community Sch. v. Kahl*, 82 Wis. 2d 139, 150, 262 N.W.2d 210 (1978). The Establishment Clause, therefore, prohibits state governments from passing laws which have either the purpose or effect of advancing or inhibiting religion. *See Agostini v. Felton*, —— U.S. ——, 117 S. Ct. 1997, 2010 (1997).

¶ 22 When assessing any First Amendment challenge to a state statute, we are bound by the results and inter-

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[4] Citing the United States Supreme Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), the Petitioners argue that since the Respondents challenge the amended Milwaukee Parental Choice Program (MPCP) as facially unconstitutional, as opposed to unconstitutional as applied to a set of particular facts, the Respondents' federal claims must fail unless they can show that under all circumstances the amended MPCP is unconstitutionl. In *Salerno*, the Court noted that to succeed with a facial challenge, a party must "establish that no set of circumstances exists under which the [statute] would be valid." *Id.* at 745. The Court has not directly held that the *Salerno* standard applies to facial challenges raised under the Establishment Clause. Nor has the Court consistently applied the *Salerno* standard in other contexts. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175-76 n.1 (1996) (Mem.) (citing cases in which Court did not apply *Salerno* language). In *Bowen v. Kendrick*, 487 U.S. 589 (1988), decided just one year after *Salerno*, the Court considered a facial challenge to the Adolescent Family Life Act under the Establishment Clause. Although it upheld the federal program, the *Bowen* Court did not cite to or apply the "no set of circumstances" language from *Salerno*. *See id.* at 627 n.1 (Blackmun, J., dissenting). We decline to apply the *Salerno* standard here. We leave to the Court the decision whether to apply the *Salerno* standard to facial challenges raised under the Establishment Clause.

pretations given that amendment by the decisions of the United States Supreme Court. *See State ex rel. Holt v. Thompson,* 66 Wis. 2d 659, 663, 225 N.W.2d 678 (1975). "Ours [is] not to reason why; ours [is] but to review and apply." *State ex rel. Warren v. Nusbaum, (Nusbaum I)*, 55 Wis. 2d 316, 322, 198 N.W.2d 650 (1972). Our limited role is not aided by the Supreme Court's candid admission that in applying the Establishment Clause, it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Pub. Educ. and Religious Liberty v. Regan,* 444 U.S. 646, 662 (1980).

¶ 23 The Supreme Court has repeatedly recognized that the Establishment Clause raises difficult issues of interpretation, and cases arising under it "have presented some of the most perplexing questions to come before [the] Court." *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 760 (1973); *see, e.g., Mueller v. Allen,* 463 U.S. 388, 392 (1983); *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971). We are therefore cognizant of the Court's warnings that:

> There are always risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics . . . [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Tilton v. Richardson, 403 U.S. 672, 678 (1971); *see also Mueller,* 463 U.S. at 393; *Lemon,* 403 U.S. at 612.

¶ 24 In an attempt to focus on the three main evils from which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity, *see Walz v. Tax Commission,* 397 U.S. 664, 668 (1970), the Court has promulgated a three-pronged test to deter-

mine whether a statute complies with the Establishment Clause. *See Lemon*, 403 U.S. at 612. Under this test, a statute does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *See id.* at 612-13. We must apply this three-part test to determine the constitutionality of Wis. Stat. § 119.23.[5]

a. First Prong—Secular Purpose

¶ 25 Under the first prong of the *Lemon* test, we examine whether the purpose of the state legislation is secular in nature. Our analysis of the amended MPCP under this prong of the *Lemon* test is straightforward. Courts have been "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95.

¶ 26 As the court of appeals recognized, the secular purpose of the amended MPCP, as in many Establishment Clause cases, is virtually conceded. *See Jackson*, 213 Wis. 2d at 29. The purpose of the program is to provide low-income parents with an opportunity to have their children

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[5] While the continued authority of the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is uncertain, we have no choice but to apply it in this case. We recognize that five current United States Supreme Court Justices have questioned the continued use of the *Lemon* test. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Until a majority of the Supreme Court directly holds otherwise, however, we continue to apply the *Lemon* test. *See Agostini v. Felton*, —— U.S. ——, 117 S. Ct. 1997, 2017 (1997) (stating that other courts should leave to the Supreme Court "the prerogative of overruling its own decisions."). Unlike the Supreme Court, we cannot command this "ghoul" to return to its tomb when we wish it to do so. *See Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring).

educated outside of the embattled Milwaukee Public School system. The propriety of providing educational opportunities for children of poor families in the state goes without question:

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well-educated.

Mueller, 463 U.S. at 395. The propriety of such legislative purpose, however, does not immunize the amended MPCP from further constitutional challenge. *See Nyquist*, 413 U.S. at 773-74. If the amended MPCP either has a primary effect that advances religion or if it fosters excessive entanglements between church and state, then the program is constitutionally infirm and must be struck down. *See id.* at 774.

b. Second Prong—Primary Effect of Edvancing Religion

¶ 27 Analysis of the amended program under the second prong of the *Lemon* test is more difficult. While the first prong of *Lemon* examines the legislative purpose of the challenged statute, the second prong focuses on its likely effect. A law violates the Establishment Clause if its principal or primary effect either advances or inhibits religion. *See Lemon*, 403 U.S. at 612; *see also Agostini*, 117 S. Ct. at 2010; *Mueller*, 463 U.S. at 396.

¶ 28 This does not mean that the Establishment Clause is violated every time money previously in the possession of a state is conveyed to a religious institution. *See Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486 (1986). "The simplistic argument

that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago . . . ." *Tilton*, 403 U.S. at 679; *see Nusbaum I*, 55 Wis. 2d at 321 n.4. The constitutional standard is the separation of church and state. *See Zorach v. Clauson* 343 U.S. 306, 314 (1952). "The problem, like many problems in constitutional law, is one of degree." *Id.*

¶ 29 We begin our analysis under the second prong of the *Lemon* test by first considering the cumulative criteria developed over the years and applying to a wide range of educational assistance programs challenged as violative of the Establishment Clause. *See Tilton*, 403 U.S. at 677-78. Although the lines with which the Court has sketched the broad contours of this inquiry are fine and not absolutely straight, the Court's decisions generally can be distilled to establish an underlying theory based on neutrality [6] and indirection: [7] state programs that are

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[6] The Supreme Court has historically looked to whether a program is neutral toward religion in defining its beneficiaries. *See, e.g., Bowen*, 487 U.S. 589 (rejecting challenge to federal program neutrally providing public funds to sectarian or purely secular institutions for services relating to adolescent sexuality and pregnancy to institutions); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736 (1976) (upholding Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the state, including religiously affiliated institutions; *Hunt v. McNair*, 413 U.S. 734 (1973) (rejecting challenge to South Carolina statute providing certain benefits to all institutions of higher education in South Carolina, whether or not having a religious affiliation); *Tilton v. Richardson*, 403 U.S. 672 (1971) (approving Federal Higher Educational Facilities Act, providing grants to "all colleges and universities regardless of any affiliation with or sponsorship by a religious body); *Board of Education v. Allen*, 392 U.S. 236 (1968) (upholding state provision of secular textbooks for both public and private schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (approving busing services equally available to both public and private school children).

[7] The Court has also focused on whether public aid that flows to religious institutions does so only as a result of "genuinely inde-

wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion. The Court has explained:

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

¶ 30 The Court's general principle under the Establishment Clause has, since its decision in *Everson*, been one of neutrality and indirection.[8] Writing for the majority in *Everson*, Justice Black set out the view of the Establishment Clause that still guides the Court's think-

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pendent and private choices of the aid recipients." *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481, 487 (1986); *see, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 842-43 (1995); *Mueller v. Allen*, 463 U.S. 388, 398 (1983); *Allen*, 392 U.S. at 243-44; *Everson*, 330 U.S. at 17-18.

[8] The concept of neutrality has developed as a necessary result of the interplay between the Establishment and Free Exercise Clauses of the First Amendment, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would clash with the other." *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). The Court in *Walz* explained:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669.

ing today. The *Everson* Court explained that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" Everson, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). The Court tempered its statement, however, by cautioning that in maintaining this wall of separation, courts must "be sure that [they] do not inadvertently prohibit [the government] from extending its general State law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Under this reasoning, the Court held that the Establishment Clause does not prohibit New Jersey from spending tax-raised funds to reimburse parents directly for the bus fares of parochial school pupils as a part of a general program under which the State pays the fares of pupils attending public and other schools. *See id.* at 17.

¶ 31 In *Nyquist*, the Court struck down on Establishment Clause grounds a New York program that, *inter alia*, provided tuition grants to parents of children attending private schools. Under the program, New York sought to assure that participating parents would continue to send their children to religion-oriented schools by relieving their financial burdens. *See Nyquist*, 413 U.S. at 783. Before striking the tuition grants, the Court distinguished on two grounds the New York statute from the New Jersey statute reviewed in *Everson*: (1) unlike the statute in *Everson*, the New York statute was non-neutral because it provided benefits solely to private schools and parents with children in private schools, *see id.* at 782 n.38; and (2) the New York statute provided financial assistance rather than bus rides, *see id.* at 781-82. The Court concluded that the fact that aid was distributed directly to parents rather than the schools, although a factor in its analysis, did not save the statute because the effect of New York's program was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

¶ 32 Significant to the case now before us, however, the Court in *Nyquist* specifically reserved the issue whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.

Id. at 782 n.38. In cases following its decision in *Nyquist,* the Court has piecemeal answered this question as it has arisen in varying fact situations. *See, e.g., Mueller,* 463 U.S. 388; *Witters,* 474 U.S. 481; *Zobrest,* 509 U.S. 1; *Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819; Agostini, 117 S. Ct. 1997.[9]

¶ 33 In *Mueller,* the Court rejected an Establishment Clause challenge to a Minnesota statute allowing taxpayers to deduct certain educational expenses in computing

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[9] We reject the Respondents' argument that this case is controlled by *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973). Although the tuition reimbursement program in *Nyquist* closely parallels the amended MPCP, there are significant distinctions. In *Nyquist,* each of the facets of the challenged program directed aid exclusively to private schools and their students. The MPCP, by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist,* the only financially-qualified Milwaukee students excluded from participation in the amended MPCP are those in the fourth grade or higher who are already attending private schools. The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. This seminal fact takes the amended MPCP out of the *Nyquist* construct and places it within the framework of neutral education assistance programs.

their state income tax, even though a majority of those deductions went to parents whose children attended sectarian schools. *See Mueller*, 463 U.S. at 401-02. "Two factors, aside from the States' traditionally broad taxing authority, informed [the *Mueller* Court's] decision." *Zobrest*, 509 U.S. at 9. First, the Court noted that, unlike the statute in *Nyquist*, the Minnesota law "permits all parents—whether their children attend public school or private—to deduct their children's educational expenses." *Mueller*, 436 U.S. at 398. Second, the Court emphasized that under Minnesota's tax deduction scheme, public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," thus distinguishing *Mueller* from other cases involving "the direct transmission of assistance from the state to the schools themselves." *Id.* at 399. The Court concluded:

> The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Id. at 400. *Mueller* makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the [*Lemon*] test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91 (Powell, J. concurring) (footnote and citations omitted).[10]

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[10] As to its discussion of the importance of *Mueller*, 463 U.S. 388, in Establishment Clause jurisprudence, Justice Powell's concurring opinion in *Witters*, 474 U.S. at 490-91, drew the support of five members of the Court. Chief Justice Burger and Justice Rehnquist joined Justice Powell's concurrence, while Justices White and O'Connor wrote separately, but agreed with Justice Powell's

¶ 34 The Court reaffirmed the dual importance of neutrality and indirect aid in *Witters*. *See Witters*, 474 U.S. 481. In *Witters*, the Court *unanimously* held that the Establishment Clause did not bar a state from issuing a vocational tuition grant to a blind person who intended to use the grant to attend a Christian college and become a pastor, missionary, or youth director.[11] The Court focused first on the program's indirect aid, finding that because the aid was paid to the student rather than the institution "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of genuinely independent and private choices of aid recipients." *Id.* at 487.

¶ 35 As in *Mueller*, the *Witters* Court then emphasized the neutrality of the program, finding that "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' " and therefore "creates no financial incentive for students to undertake sectarian education." *Id.* at 487-88 (quoting *Nyquist*, 413 U.S. at 782-83 n.38). In light of these factors,[12] the Court held that

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opinion with respect to the relevance of *Mueller*. *See Witters*, 474 U.S. at 490 (White, J. concurring); *id.* at 493 (O'Connor, J. concurring).

11 On its face, the Washington educational aid program upheld in *Witters* was in all significant aspects similar to the amended MPCP. The public aid was in the form of tuition grants and was made available to disadvantaged students generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited, *see Witters*, 474 U.S. at 488; student eligibility for the aid was based on nonsectarian criteria, *see id.* at 482 n.2, and the aid was paid directly to the student who then could transmit it to the school of his or her choice, *see id.* at 488.

12 The Court in *Witters* further distinguished the Washington program from the tuition grants in *Nyquist* by noting that in application no "significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Witters*, 474 U.S. at 488. The Court's consideration of the

Washington's program—even as applied to a student who sought state assistance so that he could become a pastor—would not advance religion in a manner inconsistent with the Establishment Clause.[13] *See id.* at 489.

¶ 36 The Supreme Court applied the same logic in *Zobrest*, where it held that the Establishment Clause did not prohibit a school district from providing to a deaf student a sign-language interpreter under the Individuals with Disabiliites Education Act (IDEA), even though the interpreter would be a mouthpiece for religious instruction. *See Zobrest*, 509 U.S. at 13-14. The *Zobrest* Court, basing its reasoning upon *Mueller* and *Witters*, again looked to neutrality and indirection as its guiding principles. Specifically focusing on the general availability of the statute, the Court found that the "service at issue in this case is part of a general government program that distributes benefits neutrally to any child . . . without regard to the . . . 'nature' of the school the child attends." *Id.* at 10.

¶ 37 The *Zobrest* Court then looked to whether the aid was direct or indirect, explaining that "[b]y according

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percentage of students who would likely transmit program aid to sectarian institutions is inconsistent with its prior decision in *Mueller*, where the Court specifically rejected any statistical analysis showing that in application parents of children in sectarian private schools would take the bulk of the benefits available under the program. *See Mueller*, 463 U.S. at 401. The *Mueller* Court explained: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* The Court recently reaffirmed the position it took in *Mueller*. *See Agostini*, 117 S. Ct. at 2013.

[13] In *Witters*, the Court limited its analysis to the first two prongs of the *Lemon* test. The Court held that the Washington program had a secular purpose and that it did not have the primary effect of advancing religion. *See Witters*, 474 U.S. at 485-86, 488-89. The Court declined to address the entanglement issue and remanded the case for further analysis. *See id.* at 489 n.5, 490.

parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as result of the private decision of individual parents." *Id.* Based on these two findings, the Court concluded: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.* (quoting *Witters*, 474 U.S. at 488).

¶ 38 In *Rosenberger*, the Supreme Court held that the Establishment Clause did not prohibit the university from funding a student organization, which otherwise would have been entitled to publication funds, merely because it published a newspaper with a Christian point of view. The Court clarified that the critical aspect of the analysis was whether the state conferred a benefit which neither inhibited nor promoted religion. *See Rosenberger*, 515 U.S. at 839. As long as the benefit was neutral with respect to religion, what the student did with that benefit, even if it was to spend all of it on religion-related expenditures, was irrelevant for purposes of analyzing whether the law or policy violated the Establishment Clause. *Id.* at 842-43.

¶ 39 Finally, in *Agostini*, the Supreme Court held that a federally funded program providing supplemental, remedial instruction on a neutral basis to disadvantaged children at sectarian schools is not invalid under the Establishment Clause when sufficient safeguards exist.[14]

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[14] Unlike the amended MPCP, the education assistance program reviewed in *Agostini* was federally funded under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq. *See Agostini*, 117 S. Ct. at 2003. The program, however, was designed and implemented by a local educational agency, the Board of Education of the City of New York. *See id.* at 2003-05. Although New York City's Title I program was federally funded,

See Agostini, 117 S. Ct. at 2016. The Court explained that while the general principles used to evaluate Establishment Clause cases have remained unchanged, the Court's "understanding of the criteria used to assess" the inquiry has changed in recent years. *Id.* at 2010.[15] The Court reiterated that the unchanged principle under the Establishment Clause remains neutrality, and that the Court will continue to ask whether the government acts with the purpose or effect of advancing or inhibiting religion. *See id.* Writing for the Court, Justice O'Connor set out three criteria the Court has in recent years used to evaluate whether an impermissible effect exists. The aid must "not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 2016.

¶ 40 After considering these three criteria, the Court held that the program did not have the primary effect of advancing religion. The Court first concluded that placing full-time employees on parochial school campuses under this program did not result in advancing religion through indoctrination. *See id.* at 2014. The Court then considered whether the criteria by which the program identified beneficiaries created a financial incentive to undertake religious indoctrination. The Court, synthesizing the central establishment clause principle, concluded that no such incentive existed under the program: "[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

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we find the *Agostini* Court's analysis of that program relevant to our review of the State funded amended MPCP.

[15] In upholding New York City's Title I program, the Supreme Court in *Agostini* directly overruled its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), as well as a portion of its decision in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

The Court also concluded that the federal program did not result in an excessive entanglement between church and state. *See id.* at 2015-16.

¶ 41 The Supreme Court, in cases culminating in *Agostini,* has established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children. The amended MPCP is precisely such a program. Applying to the amended MPCP the criteria the Court has developed from *Everson* to *Agostini,* we conclude that the program does not have the primary effect of advancing religion.

¶ 42 First, eligibility for benefits under the amended MPCP is determined by "neutral, secular criteria that neither favor nor disfavor religion," and aid "is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini,* 117 S. Ct. at 2014. Pupils are eligible under the amended MPCP if they reside in Milwaukee, attend public schools (or private schools in grades K-3) and meet certain income requirements. Beneficiaries are then selected on a random basis from all those pupils who apply and meet these religious-neutral criteria. Participating private schools are also selected on a religious-neutral basis and may be sectarian or nonsectarian. The participating private schools must select on a random basis the students attending their schools under the amended program, except that they may give preference to siblings already accepted in the schools. In addition, under the new "opt-out" provision, the private schools cannot require the students participating in the program to participate in any religious activity provided at that school.

¶ 43 Under the amended MPCP, beneficiaries are eligible for an equal share of per pupil public aid regardless of the school they choose to attend. To those eligible pupils and parents who participate, the amended MPCP provides a religious-neutral benefit—the opportunity "to choose the educational opportunities that they deem best for their children." *Davis*, 166 Wis. 2d at 532. The amended MPCP, in conjunction with existing state educational programs, gives participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school.[16] As a result, the amended program is in no way "skewed towards religion." *Mitters*, 474 U.S. at 488.

¶ 44 The amended MPCP therefore satisfies the principle of neutrality required by the Establishment Clause. As Justice Jackson explained in *Everson*:

> A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he . . . is a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman

[16] Our inquiry into the constitutionality of the amended MPCP must encompass "the nature and consequences of the program viewed as a whole." *Witters*, 474 U.S. at 492 (Powell, J., concurring). According to the stipulated facts in this case, the State's system of per-pupil school financing, in which public funds follow each child, now encompasses a wide range of school choices—mainly public, but some private or religious. Numerous programs have amended the number and type of educational options available to public school students. Qualifying public school students may choose from among the Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, schools developed for students with exceptional needs, and now sectarian or nonsectarian private schools participating in the amended MPCP. In each case, the programs let state funds follow students to the districts and schools their parents have chosen.

> has to ask before he renders aid 'Is this man or building identified with the Catholic Church.'

Everson, 330 U.S. at 25 (Jackson, J., dissenting). The amended MPSP works in much the same way. A student qualifies for benefits under the amended MPCP not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a poor family and is a student in the embattled Milwaukee Public Schools. To qualify under the amended MPCP, the student is never asked his or her religious affiliation or beliefs; nor is he or she asked whether the aid will be used at a sectarian or nonsectarian private school. Because it provides a neutral benefit to beneficiaries selected on religious-neutral criteria, the amended MPCP neither leads to "religious indoctrination," *Agostini*, 117 S. Ct. at 2014, nor "creates [a] financial incentive for students to undertake sectarian education." *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10. As Judge Roggensack concluded, "[t]he benefit neither promotes religion nor is hostile to it. Rather, it promotes the opportunity for increased learning by those currently having the greatest difficulty with educational achievement." *Jackson*, 213 Wis. 2d at 61.

¶ 45 Second, under the amended MPSP public aid flows to sectarian private schools only as a result of numerous private choices of the individual parents of school-age children. Under the original MPCP, the State paid grants directly to participating private schools. As explained above, the program was amended so that the State will now provide the aid by individual checks made payable to the parents of each pupil attending a private school under the program. Each check is sent to the parents' choice of schools and can be cashed only for the cost of the student's tuition. Any aid provided under the amended MPCP that ultimately flows to sectarian private schools, therefore, does so "only as a result of genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487.

¶ 46 We recognize that under the amended MPCP the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools. Nevertheless, we do not view these precautionary provisions as amounting to some type of "sham" to funnel public funds to sectarian private schools. In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path. As with the programs in *Mueller* and *Witters*, not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents. As a result, "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring); *see also Zobrest*, 509 U.S. at 9-10.

¶ 47 The amended MPCP, therefore, places on equal footing options of public and private school choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children's benefit. We are satisfied that the implementation of the provisions of the amended MPCP will not have the primary effect of advancing religion.[17]

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[17] The Respondents also argue that the amended MPCP has the primary effect of advancing religion because a substantial percent of the program's aid will flow to sectarian schools. They point out that of the 122 private schools eligible to participate in the amended program 89 are sectarian. We find this argument unpersuasive. The Supreme Court has warned against "focusing on the money that is undoubtedly expended by the government rather than on the nature of the benefit received by the recipient." *Rosenberger*, 515 U.S. at 843. "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. The percent of program funds eventually paid to sectarian private schools is irrelevant to our inquiry.

c. Third Prong—Excessive Government Entanglement

¶ 48 The final question for us to determine under the *Lemon* test is whether the amended MPCP would result in an excessive governmental entanglement with religion.[18] Stated another way, it is necessary to determine whether "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [against the inculcation of religious tenets] are obeyed and the First Amendment otherwise respected." *Lemon*, 403 U.S. at 619.

¶ 49 Not all entanglements have the effect of advancing or inhibiting religion. The Court's prior holdings illustrate that total separation between church and state is not possible in an absolute sense. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. Some relationship between the State and religious organizations is inevitable. *See id.* (citing *Zorach*, 343 U.S. at 312). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *See Agostini*, 117 S. Ct. at 2015.

¶ 50 The amended MPCP will not create an excessive entanglement between the State and religion. Under the amended program, the State need not, and in fact is not given the authority to impose a "comprehensive, discriminating, and continuing state surveillance" over the participating sectarian private schools. *Lemon*, 403 U.S. at 619. Participating private schools are subject to perform-

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[18] The United States Supreme Court has considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion and as an independent factor under the *Lemon* test. *See Agostini*, 117 S. Ct. at 2015. Regardless of how the Court has characterized the analysis, whether a government aid program results in such entanglement has consistently been an aspect of its Establishment Clause analysis. *See id.*

ance, reporting, and auditing requirements, as well as to applicable nondiscrimination, health, and safety obligations. Enforcement of these minimal standards will require the State Superintendent to monitor the quality of secular education at the sectarian schools participating in the plan. But this oversight already exists. In the course of his existing duties, the Superintendent currently monitors the quality of education at all sectarian private schools.

¶ 51 These oversight activities relating to conformity with existing law do no create excessive entanglement merely because they are part of the amended MPCP's requirements. *See, e.g., Mueller,* 463 U.S. at 403. As the Court held in *Hernandez v. Commissioner,* 490 U.S. 680, 696-97 (1989):

> [R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command.

(citation omitted); *accord, Agostini,* 117 S.Ct. at 2014-16; *Board of Educ. of the Westside Community Sch. v. Mergens,* 496 U.S. 226, 253 (1990); *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995). The program does not involve the State in any way with the schools' governance, curriculum, or day-to-day affairs. The State's regulation of participating private schools, while designed to ensure that the program's educational purposes are fulfilled, does not approach the level of constitutionally impermissible involvement.

¶ 52 In short, we hold that the amended MPCP, which provides a neutral benefit directly to children of economically disadvantaged families on a religious-neutral basis, does not run afoul of any of the three primary criteria the Court has traditionally used to evaluate whether a state educational assistance program has the

purpose or effect of advancing religion. Since the amended MPCP has a secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement, it is not invalid under the Establishment Clause.[19]

II State Establishment Clause

¶ 53 The next question presented in this case is whether the amended MPCP violates art. I, § 18 of the Wisconsin Constitution.[20] The Respondents argue, and the court of appeals concluded, that the amended MPCP violates both the "benefits clause" and the "compelled support clause" of art. 1, § 18. Upon review, we conclude that the amended MPCP violates neither provision.

¶ 54 The "benefits clause" of art. I, § 18 provides: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." This is Wisconsin's equivalent of the Establishment Clause of the First Amendment. *See King v. Village of Waunakee,* 185 Wis. 2d 25, 52, 517 N.W.2d 671 (1994); *Holt,* 66 Wis. 2d at 676. This court has remarked that the language of art. I, § 18, while "more specific than the terser" clauses of the First Amendment, carries the same import, *Holt,* 66 Wis. 2d at 676; both

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19 Since we conclude that the amended MPCP does not violate the Establishment Clause, we need not address the issue, raised by Petitioners Marquelle Miller, et al., whether excluding sectarian private schools from the program violates the Free Exercise Clause of the First Amendment.

20 Wis. Const. art. I, § 18 provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

provisions "are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion." *See State ex rel. Warren v. Nusbaum* (*Nusbaum II*), 64 Wis. 2d 314, 327-28, 219 N.W.2d 577 (1974) (quoting *Nusbaum I*, 55 Wis. 2d at 332). Although art. I, § 18 is not subsumed by the First Amendment, *see State v. Miller*, 202 Wis. 2d 56, 63, 549 N.W.2d 235 (1996), we interpret and apply the benefits clause of art. I, § 18 in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment. *See King*, 185 Wis. 2d at 55; *American Motors Corp. v. DILHR*, 93 Wis. 2d 14, 29, 286 N.W.2d 847 (1979); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner*, 91 Wis. 2d 145, 163-64, 280 N.W.2d 773 (1979).[21]

¶ 55 Unlike the court of appeals, which focused on whether sectarian private schools were "religious seminaries" under art. I, § 18, we focus our inquiry on whether the aid provided by the amended MPCP is "for the benefit

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[21] Citing our decision in *State v. Miller*, 202 Wis. 2d 56, 549 N.W.2d 235 (1996), the Respondents assert that we are precluded from looking to federal establishment clause jurisprudence in analyzing the amended MPCP under the "benefits clause" of Wis. Const. art. I, § 18. We disagree. In *Miller*, we correctly stated that some questions arising under art. I, § 18 "cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution." *Id.* at 64. In *Miller*, however, we interpreted and applied the "freedom of conscience" clause, and not the benefits clause, of art. I, § 18. *See id.* at 63, 65-66. This court has traditionally looked to federal establishment clause jurisprudence, and in particular the primary effects test, when interpreting the "for the benefit of" language in the benefits clause of art. I, § 18. *See, e.g., King v. Village of Waunakee*, 185 Wis. 2d 25, 51, 517 N.W.2d 671 (1994); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner*, 91 Wis. 2d 145, 163-64, 280 N.W.2d 773 (1979); *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 333, 198 N.W.2d 650 (1972) *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 227, 170 N.W.2d 790 (1969). We continue to do so in this case.

of" such religious institutions.[22] We have explained that the language "for the benefit of" in art. I, § 18 "is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section." *Nusbaum I*, 55 Wis. 2d at 333. Furthermore, we have stated that the language of art. I, § 18 cannot be read as being "so prohibitive as not to encompass the primary-effect test." *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 227, 170 N.W.2d 790 (1969). The crucial question, under art. I, § 18, as under the Establishment Clause, is "not whether some benefit accrues to a religious institution as a consequence of the legislative progam, but whether its principal or primary effect advances religion." *Nusbaum I*, 55 Wis. 2d at 333 (quoting *Tilton*, 403 U.S. at 679).

¶ 56 Applying the primary effect test developed by the Supreme Court, we have concluded above that the primary effect of the amended MPCP is not the advancement of a religion. We find the Supreme Court's primary effect test, focusing on the neutrality and indirection of state aid, is well reasoned and provides the appropriate line of demarcation for considering the constitutionality of neutral educational assistance programs such as the amended MPCP. Since the amended MPCP does not transgress the primary effect test employed in Establishment Clause jurisprudence, we also conclude that the statute is constitutionally inviolate under the benefits clause of art. I, § 18.

¶ 57 This conclusion is not inconsistent with Wisconsin tradition or with past precedent of this court.

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[22] This court has construed "religious societies" to be synonymous with religious organizations. At the time of the adoption of our constitution in 1848, the word "seminaries" was synonymous with academies or schools. *See State ex rel. Weiss v. District Board*, 76 Wis. 177, 215, 44 N.W. 967 (1890). Sectarian private schools, therefore, constitute "religious seminaries" within the meaning of art. I, § 18. *See State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 156, 115 N.W.2d 761 (1962).

Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wisconsin Indus. Sch. for Girls v. Clark County*, 103 Wis. 651, 79 N.W.2d 422 (1899); *accord Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This court has embraced this principle for nearly a century, recognizing that: "parents as the natural guardians of their children [are] the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligations to give to such children proper nurture, education, and training." *Wisconsin Indus. Sch. for Girls*, 103 Wis. at 668-69.

¶ 58 In this context, this court has held that public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties, *see, e.g., State ex rel. Atwood v. Johnson*, 170 Wis. 218, 175 N.W.2d 589 (1919), and that public funds generally may be provided to sectarian educational institutions so long as steps are taken not to subsidize religious functions, *see, e.g., Nusbaum II*, 64 Wis. 2d 314.

¶ 59 In *Nusbaum II*, this court upheld a state program that provided educational benefits without charge to students with exceptional educational needs. Where public resources were inadequate to attend to a student's exceptional needs, the State could under the program directly contract with private sectarian institutions to provide the necessary services. *See Nusbaum II*, 64 Wis. 2d at 320-21. Reviewing the program, the *Nusbaum II* court emphasized the neutral process by which students were chosen to participate in the program, *see id.* at 320, and the great lengths to which the legislature had gone to make sure that the inculcation of religious tenets did not take place, *see id.* at 325. Applying the primary effect test of *Lemon*, the court concluded that the program vio-

lated neither the Establishment Clause nor art. I, § 18. *See id.* at 322, 329.

¶ 60 In *Atwood*, 170 Wis. 218, this court upheld a program, much like the amended MPCP, that provided neutral educational assistance. The *Atwood* court considered the constitutionality of educational benefits for returning veterans that encompassed paying the cost of schooling, at any high school or college, including religious schools. Under that program, a student could choose a school, and the State directly paid to the schools the actual increased cost of operation attributed to the additional students. Upholding the program under art. I, § 18, the court concluded:

> The contention that financial benefit accrues to religious schools from [this program] is equally untenable. Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed. They are not enriched by the service they render. Mere reimbursement is not aid.

Id. at 263-64.

¶ 61 In concluding that the amended MPCP violated art. I, § 18, the court of appeals relied heavily on this court's decisions in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890) and *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 156, 115 N.W.2d 761 (1962). We find the court's reliance was misplaced.

¶ 62 In *Weiss*, the court held that reading of the King James version of the Bible by students attending public school violated the religious benefits clause of art. I, § 18. Although the court's reasoning in *Weiss* may have differed from ours, its holding is entirely consistent with the primary effects test the Supreme Court has developed and we apply today. Requiring public school students to read from the Bible is neither neutral nor indirect. The Edgerton schools reviewed in *Weiss* were directly supported by

public funds, and the reading of the Bible was anything but religious-neutral. The program considered in *Weiss* is far different from the neutral and indirect aid provided under the amended MPCP. The holding in *Weiss*, therefore, does not control our inquiry in this case.

¶ 63 In *Reynolds*, 17 Wis. 2d 148, the court struck down a publicly supported transportation program it perceived was designed to benefit parochial schools. In reaching its conclusion, the *Reynolds* court applied a stricter standard under art. I, § 18 than that used by the Supreme Court under the Establishment Clause. *See id.* at 165. This court has since rejected applying this stricter standard in cases arising under the benefits clause of art. I, § 18. *See, e.g., Lindner*, 91 Wis. 2d at 163-64; *Nusbaum II*, 64 Wis. 2d at 328; *Reuter*, 44 Wis. 2d at 227. The court's analysis and conclusion in *Reynolds* are therefore not dispositive in our inquiry here.

¶ 64 The Respondents additionally argue that the amended MPCP violates the "compelled support clause" of art. I, § 18. The compelled support clause provides "nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent . . . ." The Respondents assert that since public funds eventually flow to religious institutions under the amended MPCP, taxpayers are compelled to support places of worship against their consent. This argument is identical to the Respondents' argument under the benefits clause. We will not interpret the compelled support clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy. *See Kungys v. United States*, 485 U.S. 759, 778 (1988).

¶ 65 In *Holt*, 66 Wis. 2d 659, this court interpreted the compelled support provision and applied it to a state program under which public school children were released from school so that they could attend religious centers for

religious instruction. *See id.* at 676-77. In the context provided in *Holt*, the court interpreted the compelled support clause to prohibit the state from forcing or requiring students to attend or participate in religious instruction. *See id.* at 676. Under this interpretation, the court upheld the program, finding that the children participating in the program did so only by choice and that, although proof of attendance at the religious instruction was required, the program's requirements were directed at preventing deception rather than compelling attendance. *See id.* "Compulsion to attend is not, initially or subsequently, a part of the program." *Id.* at 677. The court therefore rejected the compelled support challenge.

¶ 66 Applying in this case the interpretation of the compelled support clause provided in *Holt*, we conclude that the amended MPCP does not violate that constitutional provision. Like the program in *Holt*, the amended MPCP does not require a single student to attend class at a sectarian private school. A qualifying student only attends a sectarian private school under the program if the student's parent so chooses. Nor does the amended MPCP force participation in religious activities. On the contrary, the program prohibits a sectarian private school from requiring students attending under the program to participate in religious activities offered at such school. The choice to participate in religious activities is also left to the students' parents. Since the amended MPCP neither compels students to attend sectarian private schools nor requires them to participate in religious activities, the program does not violate the compelled support clause of art. I, § 18.

¶ 67 In assessing whether the amended MPCP violates Wis. Const. art. IV, § 18, art. X, § 3, or the Wisconsin public purpose doctrine, we rely heavily on our analyses and conclusions in *Davis*, 166 Wis. 2d 501. In *Davis*, the school choice opponents attacked the original MPCP under a barrage of arguments similar to those raised by the Respondents in this case. Specifically, we

concluded in *Davis* that the original MPCP did not violate art. IV, § 18, art. X, § 3, or the public purpose doctrine. In this case, we limit our analysis to determining whether the amendments made to the original MPCP change either the analyses we relied upon or the conclusions we reached in *Davis*. Upon review we conclude that they do not.

III. Private or Local Bill

¶ 68 The third issue presented in this case is whether the amended MPCP is a private or local bill which was enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18.

¶ 69 Article IV, § 18 of the Wisconsin Constitution states in full: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." This constitutional provision addresses the form in which private or local legislation is enacted and not the substance of that legislation. *See Davis*, 166 Wis. 2d at 526. As we have explained, art. IV, § 18 serves three underlying purposes:

> 1) to encourage the legislature to devote its time to the state at large, its primary responsibility; 2) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and 3) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Milwaukee Brewers v. DHSS, 130 Wis. 2d 79, 107-08, 387 N.W.2d 254 (1986). "The requirements of art. IV, § 18 are prescribed to ensure accountability of the legislature to the public and to 'guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature.'" *Davis*, 166 Wis. 2d at 519 (quoting *Milwaukee County v. Isenring*, 109 Wis. 9, 23, 85 N.W. 131 (1901). The question here is whether

the amended MPCP comes within the purview of art. IV, § 18.

¶ 70 In *Davis*, we set forth a two-fold analysis for assessing whether a bill or statute violates Wis. Const. art. IV, § 18:

> We must first address whether the process in which the bill was enacted deserves a presumption of constitutionality. Second, we must address whether the bill is private or local. If the bill is found to be private or local, then the requirements of art. IV, § 18 apply; namely, that the legislation must be a single subject bill and the title of the bill must clearly reflect the subject.

Id. at 520. We review the amended MPCP under this two-fold analysis.

¶ 71 Thus, our first inquiry is whether the process by which the amended MPCP was enacted deserves the presumption of constitutionality. Where the legislature is alleged to have violated a constitutional provision mandating the procedure by which bills must pass, we will not indulge in a presumption of constitutionality, "for to do so would make a mockery of the procedural constitutional requirement." *City of Brookfield v. Milwaukee Sewerage Comm'n*, 144 Wis. 2d 896, 912-13 n.5, 426 N.W.2d 591 (1988); *see City of Oak Creek v. DNR*, 185 Wis. 2d 424, 437, 518 N.W.2d 276 (Ct. App. 1994). "Nonetheless, this court may indulge the presumption of constitutionality where it is evident that the legislature did adequately consider or discuss the legislation in question, even where such legislation was passed as part of a voluminous bill." *Oak Creek*, 185 Wis. 2d at 437, *see Davis*, 166 Wis. 2d at 521-23.

¶ 72 We find no evidence in this case that the amended MPCP was smuggled or logrolled through the legislature. On the contrary, the record establishes that the legislature "intelligently participate[d] in considering"

the amended MPCP. *Davis*, 166 Wis. 2d at 523 (quoting *Brookfield*, 144 Wis. 2d at 912 n.5). According to the the Agreed Upon Statement of Facts in this case, the amendments to the original MPCP were proposed by the Governor as a portion of the 1995-1997 biennial budget bill, which was referred to the Joint Committee on Finance. During the spring of 1995, the proposed amendments to the original MPCP, along with other aspects of the biennial budget, were discussed at public hearings throughout the state.[23] The proposed amendments were then debated, specifically amended, and in June 1995, adopted by the Joint Committee on Finance. The Assembly then debated, specifically amended, held a public hearing on, and passed the proposed amendments as part of the biennial budget bill. The biennial budget bill was then referred to the Senate. The Senate held public hearings on, debated, and concurred in the proposed amendments to the original MPCP. On July 26, 1995, the amended MPCP was enacted as a portion of the 1995-97 State of Wisconsin Biennial Budget, 1995 Wis. Act 27.

¶ 73 Under the stipulated facts of this case, we find it evident that the amended MPCP was not smuggled through the legislature, but rather was forged in the deliberative kiln of public debate. The legislature adequately considered and discussed the amended MPCP, even though the proposed amendments were ultimately enacted as part of a multi-subject bill. We therefore find it proper to apply a presumption of constitutionality to the process in which the amended MPCP was enacted into law.

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23 Public hearings on the proposed amendments to the original MPCP and other aspects of the biennial budget bill were held in the City of Milwaukee on April 3, 1995, in Cedarburg on March 21, 1995, in Madison on March 27, 1995, in Portage on March 23, 1995, and in River Falls on March 30, 1995. *See* Record Document 211A at 7.

¶ 74 Our next line of inquiry is whether the amended program is "private or local" legislation. *See Davis,* 166 Wis. 2d at 524. The term "private or local" is not defined in the constitution. Legislation that is geographically specific will not automatically be considered private or local where the general subject matter of the legislation relates to a state responsibility, that is when "the subject thereof is such that the state itself has an interest therein as proprietor, or as trustee, or in its governmental capacity, for the benefit or in the interest of the general public." *Milwaukee Brewers,* 130 Wis. 2d at 111 (citations and internal quotations omitted).

¶ 75 To assess whether the amended MPCP is private or local legislation, we apply the test this court created in *Brookfield. See Davis,* 166 Wis. 2d at 527.[24] The *Brookfield* test comprises five elements:

> First, the classification employed by the legislature must be based on substantial distinctions which make one class really different from another.
>
> Second, the classification adopted must be germane to the purpose of the law.
>
> Third, the classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.
>
> Fourth, when a law applies to a class, it must apply equally to all members of the class.
>
> . . . [F]ifth, the characteristics of each class should be so far different from those of the other classes so

[24] In assessing whether the amended MPCP is private or local legislation, we apply the five-factor test created in *City of Brookfield v. Milwaukee Sewerage Dist.*, 144 Wis. 2d 896, 426 N.W.2d 591 (1988), because the amended MPCP is not specific on its face, involves classifications, does not violate Wis. Const. art. IV, § 31, but allegedly runs afoul of art. IV, § 18. *See id.* at 912; *see also Davis v. Grover*, 166 Wis. 2d 501, 525, 480 N.W.2d 460 (1992).

> as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Davis, 166 Wis. 2d at 526 (quoting *Brookfield*, 144 Wis. 2d at 907-09).

¶ 76 In *Davis*, we held that the original MPCP satisfied all five elements of the *Brookfield* test and therefore was not private or local legislation subject to the procedural requirements in art. IV, § 18. *See Davis*, 166 Wis. 2d at 537. The 1995 amendments to the original MPCP did not change the program in any way that would alter our analyses or conclusions in *Davis* as to the first, third, fourth, and fifth elements of the *Brookfield* test.[25] In this case, the Respondents assert only that, as a result of the changes made to the program since *Davis*, the classification imposed by the amended MPCP does not satisfy the second element of the *Brookfield* test. We therefore limit our discussion to the second element of the *Brookfield* test.

¶ 77 The second element of the *Brookfield* test requires that "the classification adopted must be germane to the purpose of the law." *Brookfield*, 144 Wis. 2d at 907, 917-20. In *Davis*, we concluded that the original MPCP satisfied this element because it was "an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Davis*, 166 Wis. 2d at 530, 535. We there explained:

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[25] In all aspects relevant to the first, third, fourth, and fifth elements of the *Brookfield* test, the amended MPCP is identical to the original MPCP upheld in *Davis*. First, like the original program, the amended MPCP involves a classification recognized and accepted by this court: cities of the first class. Second, since other cities can join this class, the classification is subject to being open. Third, the amended MPCP, by its terms, applies equally to all qualifying cities. Finally, the characteristics of cities of the first class are sufficiently different from those of other classes of cities so to suggest at least the propriety of substantially different legislation. *See Davis*, 166 Wis. 2d at 526-37.

> [T]he classification of first class cities is germane to the purpose of the law. Clearly, improving the quality of education and educational opportunities in Wisconsin is a matter of statewide importance. The best location to experiment with legislation aimed at improving the quality of education is in a first class city, a large urban area where the socio-economic and educational disparities are greatest and the private educational choices are most abundant.

Id. at 535.

¶ 78 The Respondents contend that our holding in *Davis* does not control the determination in this case because the amended MPCP is no longer experimental in nature and therefore the classification of cities of the first class is no longer germane to the purpose of that law. We disagree. Despite some amendments, the program has retained its experimental character. In concluding that the original MPCP was experimental legislation, the *Davis* court focused on two characteristics of the program: its limited participation (one percent of MPS membership) and its data compilation and reporting provisions. *See id.* at 533-34. The amended MPCP has retained these two characteristics.

¶ 79 First, like the original program, the amended MPCP is not an abandonment of the public school system. With the 1995 amendments, the legislature expanded the program by increasing to 15 percent of total MPS membership the number of financially disadvantaged students eligible to attend private schools under the amended MPCP. Even though this represents a substantial increase in the total number of students eligible to participate, the program still affects only a small portion of MPS membership. No less than 85 percent of the MPS membership will be unaffected by the amended MPCP. Although it provides a somewhat larger view, the amended MPCP

still provides but a "window of opportunity to test the effectiveness of an alternative to the MPS." *Id.* at 533.[26]

¶ 80 Second, like the original program, the amended MPCP continues to allow the State to measure the effects of choice and competition on education. *See Davis*, 166 Wis. 2d at 533. Witn the 1995 amendments, the legislature deleted some of the monitoring requirements from the original plan. Specifically, the legislature deleted the requirement that the State Superintendent conduct annual performance evaluations and report to the legislature, and it eliminated the Superintendent's authority to conduct financial or performance evaluation audits of the program. *See* 1995 Wis. Act 27 at §§ 4007m and 4008m. The amended MPCP, however, requires the Legislative Audit Bureau to conduct a financial and performance evaluation of the program and to submit it to each house of the legislature by January 15, 2000. *See id.* at § 4008s.

¶ 81 The mere fact that the legislature has chosen to conduct one evaluation in the year 2000 rather than on an annual basis does not destroy the experimental nature of the amended MPCP. As we explained in *Davis*, "[t]his experiment tests a theory of education." *Id.* at 534. The effects of this experiment will be measured not only by the test scores or graduation rates of those students to whom "life preservers" have been thrown,[27] but also by the education those students who remain in MPS receive. Nor will the success or failure of this experiment

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[26] Rather than destroying the program's experimental nature, the expansion of the program to a larger sample of students may make it easier for researchers to measure the effectiveness of this experiment in education. *See* Jay P. Greene, Paul E. Peterson, & Jiangtao Du, *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data From the Program's Evaluation*, at 26-27.

[27] *See Davis*, 166 Wis. 2d at 547 (Ceci, J., concurring) ("The Wisconsin legislature . . . has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair.").

be measured by focusing solely on those students participating in the program, but also by considering whether parental choice spurs competitiveness and innovation within the public education system. The legislature has provided a reasonable process by which to review the effects of the amended MPCP. Article IV, § 18 does not dictate a particular timetable for such review. We therefore express no opinion whether yearly evaluations or one evaluation at the end of four years will provide a more accurate or more cost-effective measure of the amended MPCP's effects.

¶ 82 In short, we conclude that the amended MPCP, like the original program, is experimental legislation intended to address a perceived problem in the quality of education and educational opportunities in Wisconsin. The best location to experiment with such a program is in a city of the first class, where "socio-economic and educational disparities . . . are most abundant." *Id.* at 535. The amended MPCP's classification of cities of the first class is therefore germane to the purpose of the law. The second element of the *Brookfield* test is satisfied. Accordingly, we hold that the amended MPCP is not a private or local bill within the meaning of Wis. Const. art. IV, § 18, and thus not subject to its procedural requirements.

IV. Uniformity Clause

¶ 83 The fourth issue presented in this case is whether the amended MPCP violates the uniformity provision of Wis. Const. art. X, § 3. The court of appeals did not reach this issue, and the circuit court concluded that the amended program does not violate the uniformity clause.

¶ 84 Wisconsin Constitution art. X, § 3 states:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between

> the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; . . . .

¶ 85 The Respondents first argue that the amendments to the program, primarily the removal of funding that prevented a private school from operating solely on public funds, effectively transforms private schools participating in the amended MPCP into district schools subject to the nonsectarian clause of art. X, § 3. As in *Davis,* the key to this argument is whether private schools, by participating in the amended MPCP, become "district schools" for the purposes of the uniformity clause. We conclude that they do not.

¶ 86 Relying on the classification in Wis. Stat. § 115.01(1) and on the fact that a private school could receive 100 percent of its tuition from public funds, the Respondents contend that private schools participating in the amended MPCP will become "public schools" because they will be "elementary and high schools supported by public taxation." In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original MPCP were "district schools" to which the uniformity requirement applies. *See Davis,* 166 Wis. 2d at 538. The court noted that the original MPSP explicitly referred to paticipating schools as "private schools" and observed that "[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school." *Id.* at 539-40.

¶ 87 We apply the same reasoning in this case. Like the original MPCP, the amended program expressly refers to participating schools as "private schools." The term "private school" is defined by statute to include those private institutions satisfying the requirements of Wis. Stat. § 118.165 or determined to be a private school by the State Superintendent under Wis. Stat. § 118.167. *See* Wis. Stat. § 115.001(3r). "We assume that the legislature was aware of this statutory meaning and intended to use 'private school' . . . as a statutory term of art." *Davis,*

166 Wis. 2d at 538. As in *Davis*, we conclude that the mere appropriation of public monies to a private school does not transform that school into a district school under art. X, § 3. This conclusion is not affected by the amount of public funds a private school receives.

¶ 88 The Respondents also argue that art. X, § 3 prohibits the State from diverting students and funds away from the public school system. Article X, § 3, the Respondents contend, requires that the district schools be the only system of state-supported education. This argument too was raised and specifically rejected in *Davis*. *See Davis*, 166 Wis. 2d at 538-40.

¶ 89 In *Davis*, the choice opponents argued that the explicit requirement in art. X, § 3 that the State establish public district schools implicitly prohibits the legislature from spending public funds to support any schools other than district schools. As a dissenting opinion argued: "the constitutional system of public education was intended to be the only general school instruction to be supported by taxation." *Davis*, 166 Wis. 2d at 558 (Abrahamson, J., dissenting). The court, relying on precedent of this court, rejected that contention. *See id.* at 537-38 (citing *State ex rel. Comstock v. Joint Sch. Dist. No. 1*, 65 Wis. 631, 636-37, 27 N.W. 829 (1886) and *Kukor v. Grover*, 148 Wis. 2d 469, 496-97, 436 N.W.2d 568 (1989)); *accord Buse v. Smith*, 74 Wis. 2d 550, 565, 247 N.W.2d 141 (1976); *Reuter*, 44 Wis. 2d at 221; *City of Manitowoc v. Town of Manitowoc Rapids*, 231 Wis. 94, 98, 285 N.W. 403 (1939). Applying the reasoning of *Comstock* and *Kukor*, the court concluded that art. X, § 3 provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin:

> The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin

> receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education.

Davis, 166 Wis. 2d at 539.

¶ 90 Similar to the original MPCP upheld in *Davis*, the amended MPCP in no way deprives any student of the opportunity to attend a public school with a uniform character of education. By enacting the amended MPCP, the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by the State under art. X, § 3. The students participating in the amended MPCP do so by choice and may withdraw at any time and return to a public school. "[W]hen the legislature has provided for each [] child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with." *Comstock*, 65 Wis. at 636-37. As in *Davis*, we conclude that the legislature has done so here. The amended MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated.

¶ 91 We therefore hold that the sectarian private schools participating in the MPCP do not constitute "district schools" for the purposes of the uniformity clause. We also reaffirm the position that the legislature has fulfilled its constitutional duty to provide for the basic education of our children. The State's experimental attempts to improve upon that foundation in no way deny any student the opportunity to receive the basic education in the public school system. *See Davis*, 166 Wis. 2d at 539.

V. Public Purpose Doctrine

¶ 92 The Fifth issue presented in this case is whether the amended MPCP violates Wisconsin's public purpose doctrine. The court of appeals did not reach this issue, and the circuit court concluded that it does.

¶ 93 The public purpose doctrine, although not recited in any specific clause in the state constitution, is a well-established constitutional doctrine. *See Hopper v. City of Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977). As this court stated in *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973), "[p]ublic funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin."

¶ 94 Under the public purpose doctrine, "[w]e are not concerned with the 'wisdom, merits or practicability of the legislature's enactment.' Rather we are to determine whether a 'public purpose can be conceived which might reasonably be deemed to justify or serve as a basis for the expenditure.'" *Millers Nat'l Ins. v. City of Milwaukee*, 184 Wis. 2d 155, 175-76, 516 N.W.2d 376 (1994) (quoting *Hopper*, 79 Wis. 2d at 129) (internal citation omitted). "A court can conclude that no public purpose exists only if it is 'clear and palpable' that there can be no benefit to the public." *La Plante*, 58 Wis. 2d at 56 (citation omitted).

¶ 95 No party disputes that education constitutes a valid public purpose, or that private schools may be employed to further that purpose. Education ranks at the apex of a state's function. *See Yoder*, 406 U.S. at 213; *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). This court has long recognized that equal educational opportunities are a fundamental right, *see, e.g., Buse*, 74 Wis. 2d 550, and that the State has broad discretion to determine how best to ensure such opportunities. *See Davis*, 166 Wis. 2d at 541-44; *Kukor*, 148 Wis. 2d 492-94; *Atwood*, 170 Wis. at 263-64.

¶ 96 The parties in this case dispute only whether the private schools participating in the amended program are under proper governmental control and supervision, as required by *Wisconsin Industrial School for Girls*, 103

Wis. at 668. *See Davis,* 166 Wis. 2d at 541-42; *Reuter,* 44 Wis. 2d at 216. The Respondents allege that the amended MPCP lacks sufficient control and accountability to secure a public interest. They note that some of the reporting requirements in the original MPCP upon which the court in *Davis* focused have been eliminated by amendment.

¶ 97 The control and accountability requirements imposed under the public policy doctrine are not demanding. *See Reuter,* at 216. In *Davis* we explained:

> To test the propriety of expending public monies to a private institution for public purposes, this court must determine whether the private institution is under reasonable regulations for control and accountbility to secure public interests. 'Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required.'

Davis, 166 Wis. 2d at 542 (quoting *Reuter,* 44 Wis. 2d at 216) (internal citation omitted). We therefore must determine only whether the amended MPCP includes control and accountability requirements reasonably necessary to secure the public purpose to which it is directed.

¶ 98 The control and accountability arguments raised by the Respondents in this case were largely handled by this court in *Davis. See id.* at 541-45. In *Davis,* we upheld the original MPCP under a public purpose doctrine challenge. As in this case, the choice opponents in *Davis* argued that the controls in the original MPCP were woefully inadequate. We there concluded that the statutory controls applicable to private schools coupled with parental choice sufficed to ensure that the public purpose was met. *See id.* at 546.

¶ 99 Similarly, in *Reuter* this court held that public appropriations to a private medical school did not violate the public purpose doctrine where the circumstances pre-

sented "no frivolous pretext for giving money to a private school but the using of a private school to attain a public purpose." *Reuter*, 44 Wis. 2d at 214. The court noted that the private school was not regulated to the same extent as public schools, but it concluded that:

> A private agency cannot and should not be controlled as two-fistedly as a government agency. . . . A private agency is selected to aid the government because it can perform the service as well or better than the government. We should not bog down private agencies with unnecessary government control. . . . We do not think it is necessary or required by the constitution that the state must legally be able to control the agency corporation in order to find sufficient regulations for control and accountability. The state is not interested in controlling the day-to-day operation of the medical school but in its end product.

Id. at 217.

¶ 100 In light of the standard applied in *Davis* and *Reuter*, we conclude that control and accountability safeguards in the amended MPCP are sufficient to ensure that the program fulfills its purpose of promoting education. First, the private schools participating in the amended MPCP continue to be subject to the instruction, curriculum, and attendance regulations that govern all private schools. See Wis. Stat. §§ 118.165(1) and 118.167; *Davis*, 166 Wis. 2d at 543. Second, the amended MPCP continues to require an annual financial audit by the State Superintendent and provides for an additional review by the Legislative Audit Bureau covering both financial and performance evaluations of the plan. *See* Wis. Stat. § 119.23(7)(am), (9). Finally, as in *Davis*, the schools participating in the amended MPCP are also subject to the additional checks inherent in the notion of school choice. "Control is also fashioned with the [plan] in the form of parental choice. . . . If the private school does

not meet the parents' expectations, the parents may remove the child from the school and go elsewhere." *Davis*, 166 Wis. 2d at 544. These combined elements of the amended MPCP are more than sufficient control and accountability measures to ensure that the program serves the public purpose to which it is directed.

¶ 101 The Respondents additionally argue that the amended MPCP violates the public purpose doctrine because it funds religious education and other religious activities that are not public purposes. The Respondents argue, and the circuit court held, that because public funds flow to religious private schools, the program does not serve a public purpose. We find this argument unfounded. We have never interpreted the public purpose doctrine to incorporate an anti-establishment principle. That the State has chosen to include sectarian private schools in the amended MPCP does not render the program's public purpose invalid. Whether the State may adopt such an approach is an issue we resolve under the provisions of art. I, § 18.

¶ 102 We therefore hold that the amended MPCP does not violate the public purpose doctrine because it fulfills a valid public purpose, and it contains sufficient and reasonable controls to attain its public purpose.

VI. NAACP's Equal Protection Claim

¶ 103 In addition to the challenges raised by the Respondents, the NAACP alleges that the amended MPCP violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution.[28] Although this issue

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[28] The Fourteenth Amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The functional equivalent of this clause is found in Wis. Const. art. I, § 1:

was not addressed by the circuit court or the court of appeals, it was briefed and argued before this court by the NAACP. Upon review, we conclude that the NAACP's facial equal protection claim must fail as a matter of law.

¶ 104 It is the often repeated rule in this state that issues not considered by the circuit court will not be considered for the first time on appeal. *See Binder v. City of Madison*, 72 Wis. 2d 613, 618, 241 N.W.2d 613 (1976); *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). This rule is not absolute, however, and exceptions are made. *See Binder*, 72 Wis. 2d at 618; *Cords v. State*, 62 Wis. 2d 42, 54, 214 N.W.2d 405 (1974). In this case, all the issues raised are legal questions that can be disposed of "based upon a consideration of the record." *State v. Conway*, 34 Wis. 2d 76, 83, 148 N.W.2d 721 (1967); *see Smith v. Katz*, No. 96-1998, op. at 9 (S. Ct. June 2, 1988); *Wirth*, 93 Wis. 2d at 443-44. In the interests of judicial economy and the finality of this decision, we exercise our discretion to decide the entire case while it is before us. *See Carlson & Erickson Builders v. Lampert Yards*, 190 Wis. 2d 650, 656, 529 N.W.2d 905 (1995); *Burger v. Burger*, 144 Wis. 2d 514, 518, 424 N.W.2d 691 (1988); *Wirth*, 93 Wis. 2d at 444. We therefore proceed to address the NAACP's equal protection claim.

¶ 105 The Fourteenth Amendment guarantee of equal protection provides "a right to be free from invidious dis-

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"All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." As we noted in *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49-50, 132 N.W.2d 249 (1965) even though art. I, § 1 is based on the Declaration of Independence, "there is no substantial difference" between its equal protection and due process provisions and that of the Fourteenth Amendment. Thus, in our analysis of the NAACP's equal protection argument, the two constitutional provisions are treated as equivalent. *See id.* at 50.

crimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). The central purpose of the Equal Protection Clause is to prevent "official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). To show racial discrimination in violation of this guarantee, a plaintiff must show that a statute was enacted with a purpose or intent to discriminate. *See id.* at 242; *see also Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977). The Supreme Court has adhered to this principle in school desegregation cases: "that there are both predominately black and predominately white schools in a community is not alone violative of the Equal Protection Clause." *Davis*, 426 U.S. at 240 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973)). Even accepting the NAACP's allegations as true and construing them liberally, *see Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 669, 292 N.W.2d 816 (1980), we conclude that the NAACP's allegations do not support a claim of a violation of equal protection.

¶ 106 In its facial challenge, the NAACP has not alleged, and we cannot reasonably infer, that the State acted wtih an intent to discriminate on the basis of race when the State enacted the amended MPCP. Although the NAACP generally concludes that the purposes of the MPCP were expanded to include segregation of the races in the MPS, the NAACP does not allege that the State enacted the amended MPCP with the intent to discriminate based on race. Nor does the NAACP allege that the private schools participating in the amended program have excluded students on the basis of race or have in any other way intentionally discriminated against students based on race.[29]

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[29] In its brief and at oral argument, the NAACP relied heavily on *Norwood v. Harrison*, 413 U.S. 455 (1973). The claims made in *Norwood* are distinguishable from those made by the NAACP in

¶ 107 We note that, on its face, the amended MPCP is race-neutral. As we have explained, the amended MPCP allows a group of students, chosen without regard to race, to attend schools of their choice. Furthermore, the amended MPCP requires participating schools to comply with the antidiscrimination provisions of 42 U.S.C. § 2000d. *See* Wis. Stat. § 119.23(2)(a)4. In addition, the participating schools are required to select program students on a random basis. *See id.* at § 119.23(3)(a).

¶ 108 None of the facts presented by the NAACP support a claim that the State enacted the amended MPCP with an intent or purpose to discriminate based on race. Relying solely on the racial makeup of the MPS and of the private schools likely to participate in the amended MPCP, the NAACP alleges that the program violates equal protection because its likely effect will be to further segregate the MPS. We recognize that an invidious discriminatory purpose may be inferred from the totality of the relevant facts, including the fact that a challenged law may, in effect, bear more heavily on one race than another. *See Davis*, 426 U.S. at 242. We, however, can make no such inference in this case. In its *facial* challenge, the NAACP cannot establish facts sufficient to show that the amended MPCP has had a disproportionate impact on one race or that its provisions have been applied so as to invidiously discriminate on the basis of race. The

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this case. First, the plaintiffs in *Norwood* did not raise a facial challenge to the Mississippi textbook program, but rather challenged the program as it applied to particular private schools. *See id.* at 457. Second, unlike the NAACP in this case, the plaintiffs in *Norwood* alleged that the private schools receiving benefits under the textbook program had racially discriminatory policies and had excluded students on the basis of race. *See id.* Third, the plaintiffs in *Norwood* alleged that the State lent textbooks to private schools without regard to whether any of those schools had racially discriminatory policies. *See id.* at 456. In contrast to the program in *Norwood*, the amended MPCP requires that all participating schools comply with the anti-discrimination provisions of 42 U.S.C. § 2000d. *See* Wis. Stat. § 119.23(2)(a)4.

NAACP's current facial challenge and our review in this case is limited to the statute on its face and to the stipulated facts. From the record before us, we conclude that the NAACP has not sufficiently alleged that the State enacted the amended MPCP with the discriminatory intent necessary to establish an equal protection claim. *See Davis*, 426 U.S. at 238-48.

¶ 109 While we accept as true the facts pled, we are not required to assume as true the legal conclusions pled by the NAACP. *See State v. Wisconsin Tel. Co.*, 91 Wis. 2d 702, 720, 284 N.W.2d 41 (1979). We find that there are no circumstances under which the NAACP can prevail in its facial equal protection challenge to the amended MPCP. We therefore conclude that the NAACP's claim must be dismissed as a matter of law for failure to state a claim upon which relief can be granted. *See Voss*, 162 Wis. 2d at 748; *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985).

VII. Severability

¶ 110 Since we find that the amended MPCP passes constitutional scrutiny in all the issues presented before this court, we need not consider whether individual provisions are severable from Wis. Stat. § 119.23.

VIII. Injunction

¶ 111 On August 25, 1995, this court granted an injunction enjoining implementation of all portions of the amended MPCP. After further proceedings, the circuit court dissolved this injunction for all portions of the amended program except with respect to the participation of sectarian private schools. Since we now conclude that the amended program is constitutional in its entirety, we order the circuit court to dissolve the injunction for all portions of the amended MPCP.

¶ 112 When the injunction first issued against implementation of the amended MPCP, thousands of children

who were eligible for full tuition under the program already had enrolled in or begun attending their new private schools. Faced with having to remove their children from their chosen schools, many parents accepted private assistance to keep their chidlren in those schools. When the injunction is lifted, many of these students no longer will be eligible to participate in the amended MPCP because they are already attending private schools. *See* Wis. Stat. § 119.23(2)(a)2. Their ineligibility is no fault of their own, but instead is solely a consequence of this litigation. Those children certainly are among the intended beneficiaries of this program. To require them to return to MPS for a year to reestablish eligibility would be manifestly inequitable and disruptive to the public schools, to the private schools, and most importantly, to the children themselves.

¶ 113 In dissolving the injunction, we therefore remove the disability that the injunction placed on the school children, so that with respect to educational status, eligibility under the amended MPCP is determined on the date the injunction was issued.

IX. Conclusion

¶ 114 In conclusion, based upon our review of both the statute now before us and the stipulated facts, we conclude that the amended MPCP does not violate the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. IV, § 18; art. X, § 3; or the Wisconsin public purpose doctrine. We therefore reverse the decision of the court of appeals and remand the matter to the circuit court with directions to grant the State's motion for summary judgment, to dismiss the NAACP's facial equal protection claim, and to dissolve the injunction barring the implementation of the amended MPCP.

By the Court.—The decision of the court of appeals is reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

§ 115 ANN WALSH BRADLEY, J. did not participate.

¶ 116 WILLIAM A. BABLITCH, J. (*dissenting*). I conclude, as did a majority of the court of appeals, *see Jackson v. Benson* 213 Wis. 2d 1, 570 N.W.2d 407 (Ct. App. 1997), that the amended Milwaukee Parental Choice Program violates the prohibition contained in Wis. Const. art. I, § 18, against state expenditures for the benefit of religious societies or seminaries. For the reasons recited therein, I respectfully dissent.

¶ 117 I am authorized to state that Chief Justice Shirley S. Abrahamson joins in this dissent.

APPENDIX B

[Filed Aug. 2, 1997]

[Court of Appeals Decision Dated and Released
August 22, 1997]

IN COURT OF APPEALS
DISTRICT IV
STATE OF WISCONSIN

No. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SEROTTTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES AND PHILIP JONES,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION, DEPARTMENT OF PUBLIC INSTRUCTION AND JAMES E. DOYLE,

Defendants-Appellants,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES, PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,

Intervenors-Defendants-Appellants.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, BY ITS PRESIDENT, M. CHARLES HOWARD, MICHAEL LENGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., BY ITS EXECUTIVE DIRECTOR, CARL A. GOBEL, PEOPLE FOR THE AMERICAN WAY, BY ITS EXECUTIVE VICE PRESIDENT AND LEGAL DIRECTOR, ELLIOTT M. MINCEBERG, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN AND SALLY F. MILLS,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION, DEPARTMENT OF PUBLIC INSTRUCTION AND JAMES E. DOYLE,

Defendants-Appellants,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES, PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,

Intervenors-Defendants-Appellants.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, FELMERS O. CHANEY, LOIS PARKER, on behalf of herself and her minor child, RASHAAN HOBBS, DERRICK D. SCOTT, on behalf of himself and his minor children, DERESIA C.A. SCOTT AND DESMOND L.J. SCOTT, CONSTANCE J. CHERRY, on behalf of herself and her minor children, MONIQUE J. BRANCH, MONICA S. BRANCH, AND WILLIAM A. BRANCH,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WISCONSIN, in his official capacity,
Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DEININGER, J. The Milwaukee Parental Choice Program, § 119.23, STATS., as amended by 1995 Wis. Act 27, §§ 4002-4009, permits up to 15% of the student membership of the Milwaukee Public School (MPS) system to attend private schools, both sectarian and nonsectarian, at state expense. Plaintiffs brought these actions claiming that the amended program violates the First Amendment of the U.S. Constitution and various provisions of the Wisconsin Constitution. Defendants appeal the trial court's order which granted plaintiffs' motions for summary judgment and declared the amended program unconstitutional. Because we conclude that the amended program violates the religious benefit clause of Article I, section 18 of the Wisconsin Constitution,[1] we affirm.

BACKGROUND

The parties have stipulated to certain facts. The following background summary is taken from the agreed upon facts, including attached exhibits, and with respect to certain matters, from the trial court's decision and order.

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[1] Article I, section 18 of the Wisconsin Constitution provides in part: ". . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

a. The Original Milwaukee Parental Choice Program

The legislature enacted the Milwaukee Parental Choice Program, § 119.23, STATS., as a part of 1989 Wis. Act 336. As amended in 1993, the program permitted up to 1.5% of the pupil "membership" [2] of MPS to attend "at no charge, any nonsectarian private school located" in the City of Milwaukee, subject to certain eligibility requirements. The total pupil membership of MPS was more than 98,000 for the 1995-96 school year. Approximately 1500 pupils were permitted to participate under the original program, and as we discuss below, approximately 15,000 pupils would be eligible for the program as subsequently amended in 1995. Eligibility for participation in the program is limited to pupils from families whose income does not exceed 1.75 times the federal poverty level.

A private school accepting students under the program must notify the State Superintendent of Public Instruction of its intent to participate by May 1st of the previous school year. Additionally, a private school accepting students under the program must comply with state and federal anti-discrimination laws, and with health and safety provisions that apply to public schools. Not more than 65% (originally 49%) of a private school's enrollment may consist of pupils attending the private school under the original program. In order to continue participation in the program in subsequent years, a private school must satisfy certain performance criteria, assuring that at least a certain percentage of the pupils participating in the program advance one grade level each year, maintain a certain average attendance rate, demonstrate significant academic progress, or meet parent involvement criteria established by the school.

In return for accepting students under the original program, a private school receives payments directly from the

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[2] School district "membership" is defined in § 121.004(5), STATS.

State equal to the amount of state aid per student to which MPS would be entitled under state school aid distribution formulas. The aid amount was approximately $2500 per student in the initial year of the program. The amount of state aid received by MPS is reduced by the amount of payments made to private schools under the program.

The original program called for extensive monitoring, evaluation, and reporting regarding the program and its participants. Specifically, the State Superintendent of Public Instruction was required to submit an annual report to the legislature regarding student achievement, attendance, discipline, and parental involvement for students in the program as compared to pupils enrolled in MPS district schools. The original statute further directed the State Superintendent to monitor performance of pupils in the program and empowered him or her to conduct one or more financial and performance evaluation audits of the program. The legislative audit bureau was also directed to perform a financial and performance audit and to report to the legislature by January 15, 1995.

During the 1994-95 school year, approximately 800 pupils attended approximately twelve nonsectarian private schools under the original program. For 1995-96, there were approximately 1600 pupils attending approximately seventeen nonsectarian private schools under the program.

The original program withstood a state constitutional challenge in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992). The court determined that the original program "was an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Id.* at 530, 480 N.W.2d at 470 (citation omitted). It concluded that the enactment of the original program did not constitute a "private or local bill" within the meaning of Article IV, section 18 of the Wisconsin Constitution; that the private schools participating in the program did not constitute "district

schools" for purposes of the "district school uniformity clause," Article X, section 3 of the Wisconsin Constitution; and that sufficient safeguards providing governmental control and supervision of the program existed to insure that the "public purpose doctrine" was not violated.

b. The Amended Milwaukee Parental Choice Program

In the biennial budget bill, 1995 Wis. Act 27, §§ 4002-4009, the legislature significantly amended the original program. Amendments to the program include the following:

(1) The limitation that participating private schools be "nonsectarian" was removed. *See id.* § 4002.

(2) Allowable pupil participation was increased to 7%, and eventually 15%, of the MPS pupil membership. *See id.* § 4003.

(3) The requirement for the State Superintendent's annual performance evaluation and report to the legislature was deleted, as was the superintendent's authority to conduct "one or more financial or performance evaluation audits" of the program. *See id.* §§ 4007m and 4008m.

(4) A change was made in the way state aid payments to participating private schools is administered. Instead of making the state aid for participating students payable directly to the private school of attendance, the aid is to be made payable to the student's "parent or guardian." The Department of Public Instruction (DPI) is directed, however, to "send the check to the private school," and "[t]he parent or guardian shall restrictively endorse the check for the use of the private school." *See id.* § 4006m.

(5) A limitation was placed on the amount of the per student aid payment. A participating school will receive the lesser of the MPS per student state aid or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by DPI. *See id.* § 4006m.

(6) The limitation that no more than 65% of a private school's enrollment may consist of program participants was repealed. *See id.* § 4003.

(7) A religious activity "opt-out" provision was added. A private school "may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities." *See id.* § 4008e.

The amendments to the program greatly expand not only the number of students who are allowed to participate, but also the number of private schools in the City of Milwaukee which may now accept students in the program. There are approximately 122 private schools in the city, of which approximately thirty-three are nonsectarian and approximately eighty-nine are sectarian. Approximately 84% of the pupils who attended private schools in the City of Milwaukee during the 1994-95 school year attended sectarian private schools.

The amount of state aid per pupil provided to MPS for the 1995-96 school year was approximately $3667. For the 1996-97 school year, the MPS per student aid amount was approximately $4400. These sums represent an upper limit on the amount of payments per student to private schools for each pupil in the program. The parties stipulated that:

> The tuition charged by at least a majority of the sectarian private schools that notified the Superintendent of Public Instruction of their intent to participate in the [a]mended [program] during the 1995-96 school year is less than the school's per-pupil operating and debt service cost and is less than the per-pupil state aid provided to MPS.

Prior to the injunction which suspended implementation of the amended program, some 4000 MPS pupils had applied to attend private schools under the amended program.

The parties further stipulated that under the amended program:

> [T]he State does not prohibit the participating sectarian private schools from using funds received by the school for any purpose the school deems appropriate, including, among other things, the payment of salaries and expenses of employees affiliated with the school's religious mission, the purchase of literature and other materials identified with the school's religious mission, and the maintenance and construction of facilities used for religious purposes.

Attached to the parties agreed upon statement of facts is an exhibit consisting of some 800 pages of excerpts from handbooks, mission statements, and other written materials prepared by many of the sectarian schools that indicated an intent to participate in the amended program for the 1995-96 school year. Numerous statements extracted from these materials, and quoted in the trial court's written decision and order, indicate that some of the eligible sectarian schools have an overtly religious mission, and that the sectarian aspects of their educational programs are intertwined with the teaching of secular subjects. The following statements are representative:

- "We believe our school exists to carry out the Savior's command to 'go and make disciples' (Matthew 28:19). Consequently, our school's primary reason for existence is to be a tool for bringing young souls to faith in Jesus. . . ." *Exhibit E—Agreed Upon Statement of Facts*, p. 275.
- "First and foremost Garden Homes Lutheran Church conducts and maintains a Christian ele-

mentary school to assist Christian parents in the training and nurturing of their children in the Word of God." *Id.* at 316.

- "In keeping with the purpose of our school, our curriculum is taught in the setting of God's Word. Religion is not only taught as a subject, but our teachers have been trained to integrate God's Word across the curriculum. . . . Our curriculum offerings place Christ as the focal point for all study." *Id.* at 414, 417.

- "The message of Jesus is taught in religion classes and other curricular areas. . . . Because of the nature of a Catholic school, religion is taught daily as part of the curriculum. Catholic values are also incorporated into all other aspects of the curriculum." *Id.* at 614, 617.

- "The Bible forms the core and center upon which all instruction is based. . . . All subjects are taught by a Christian teacher in the light of God's Word, emphasizing God's love for all men through Jesus." *Id.* at 131.

- "We teach all the traditional subjects, but we teach them differently—from a Christian perspective." *Id.* at 526.

The materials from the sectarian schools also indicate that many charge tuition that is hundreds of dollars less than what the schools deem to be their actual cost of educating each student. The difference between the costs incurred for educating students at the sectarian private schools and the tuition charged to parents is generally made up by subsidies from the affiliated parishes and congregations.

c. The Litigation

1. The Parties.

Plaintiffs Warner Jackson, et al., are citizens and taxpayers of the State of Wisconsin. These plaintiffs include parents and members of the clergy from diverse religious and ethnic backgrounds, many of whom have children enrolled in the MPS. They commenced an action challenging the amended program with respect to the inclusion of sectarian private schools. These plaintiffs will be referred to as the Jackson plaintiffs.

Plaintiffs Milwaukee Teachers' Education Association, et al., consist of teachers and other employees of MPS, parents of pupils enrolled in MPS or another public school system in Wisconsin, a member of the clergy, and various organizations that represent the individual plaintiffs. These plaintiffs commenced a separate action challenging the provisions of the amended program, and their action was consolidated with the Jackson plaintiffs' action. These plaintiffs will be identified as the MTEA plaintiffs.

Plaintiffs National Association for the Advancement of Colored People, et al., filed a later, separate action challenging the amended program. The NAACP plaintiffs raised some of the same challenges as the first two plaintiff groups, but brought an additional claim that the amended program also violates the equal protection provisions of the United States and Wisconsin Constitutions. Their action was consolidated with the first two actions, although further proceedings on the equal protection claim were stayed by the trial court. These plaintiffs will be identified as the NAACP.

Defendant John Benson is the Superintendent of Public Instruction for the State of Wisconsin. Defendant Department of Public Instruction (DPI) is the administrative agency of the State through which funding for the Milwaukee Parental Choice Program is directed, and to which are delegated various supervisory and administrative responsibilities with respect to the program. These defendants will be identified as the State.

Intervening defendants Marquelle Miller, et al., are pupils, and the parents of pupils, who seek to participate in the amended program. They were granted leave to intervene and participate as defendants in the action. In addition to defending the amended program against the challenges raised in the consolidated actions, the Miller defendants claim that their rights to freely exercise their religions under the United States and Wisconsin Constitutions would be abridged if the amendments to the program are invalidated. These defendatns will be identified as the Miller defendants.

Annette Polly Williams is a representative to the Wisconsin State Assembly for the Tenth District, in which numerous participants in the program and potential participants in the amended program reside. Representative Williams authored the original program and certain 1995 amendments at issue here. Parents for School Choice is an organization created to mobilize public support for an expansion of the program. Also included as intervenors with this group are parents of pupils who seek to participate in the amended program. These parties were granted leave to intervene as defendants and will be referred to as PSC.

Except where necessary to identify issues or arguments unique to a particular party, all plaintiffs in the consolidated actions will be referred to, collectively, as the Challengers, and all defendants as the State.

2. Procedural History.

The parties filed the two original actions in August 1995. The supreme court then granted leave to commence an original action in that court and entered a preliminary injunction staying the implementation of the amended program, specifying that the pre-1995 provisions of the original program were unaffected. Following oral argument, the supreme court announced that it was deadlocked three to three on the constitutional issues, and it dismissed the

petition, effectively remanding the case to the Dane County Circuit Court for further proceedings. Following remand, the trial court partially lifted the preliminary injunction, thereby allowing all of the 1995 amendments to be implemented *except* participation by sectarian schools.

The parties filed cross-motions for summary judgment. The trial court denied the defendants' motions for summary judgment; granted the plaintiffs' motions for summary judgment; and ordered "the State of Wisconsin . . . to terminate the amended Milwaukee Parental Choice Program," but stayed its order until the close of the 1996-97 school year. Specifically, the trial court concluded that the amended program violates Article I, section 18 of the Wisconsin Constitution because its primary effect "is to benefit the religious missions of the elementary and secondary religious schools and because it compels Wisconsin taxpayers to support places of worship without their consent." The trial court also ruled that the amended program was a private or local bill that had been enacted in violation of the restrictions of Article IV, section 18 of the Wisconsin Constitution.[3] The court further concluded that the amended program, insofar as it included sectarian private schools, violates the Wisconsin public purpose doctrine. Finally, the trial court rejected the claim that the expanded program violates Article X, section 3 of the Wisconsin Constitution.[4] The trial court did not reach the First Amendment claim because it invalidated the amended program on state constitutional grounds.

Defendants appeal the trial court's order terminating the amended program.

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[3] "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." WIS. CONST. art. iv, § 18.

[4] "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . and no sectarian instruction shall be allowed therein . . . ." WIS. CONST. art. x, § 3.

ANALYSIS

We are an error correcting court. *State v. Schumacher*, 144 Wis.2d 388, 407, 424 N.W.2d 672, 679 (1988). Our role is not to pass judgment on the wisdom of the amended program as an instrument of public policy aimed at improving educational opportunities for children from low income families in the City of Milwaukee. Nor is it primarily our role to develop and declare Wisconsin constitutional law regarding the matters argued by the parties in this case. *See Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 255-56 (1997). Rather, our responsibility is to determine whether the trial court reached a result that is consistent with the text of the Wisconsin Constitution, and if necessary, the U.S. Constitution, and with existing precedents interpreting the provisions at issue. We conclude that the trial court reached such a result.

The parties requested that we expedite consideration of this appeal, and we agreed to do so. The parties argued the case shortly after briefing was completed, and this decision is being issued within the month following oral argument. The parties submitted briefs which cumulate to more than 365 pages, not including appendices and the briefs of *amici curiae*. In order to honor our commitment to timely dispose of this appeal, we cannot specifically address each argument raised in the various briefs. To the extent that the Challengers have raised issues or arguments not addressed in this opinion, we have concluded that they are not necessary to our disposition. To the extent that any arguments raised by the State remain unaddressed, we have concluded that those arguments do not persuade us that a different disposition is warranted.

a. Standard of Review.

The order under review grants summary judgment on stipulated facts. The issue is the constitutionality of a state statute. This appeal, therefore, involves questions of law which we decide de novo. *State v. Post*, 197 Wis.2d

279, 301, 541 N.W.2d 115, 121 (1995). The legislative enactment under review enjoys a presumption of constitutionality, and although the issue is one of law, the Challengers are deemed to bear the burden "to prove" the statute unconstitutional "beyond a reasonable doubt." *Id.*, (citation omitted).

The State argues that the present actions mount a "facial" challenge to the amended program because plaintiffs seek to have the 1995 amendments to § 119.23, STATS., enjoined *in toto,* rather than just in certain applications. Thus, the State, citing *United States v. Salerno,* 481 U.S. 739, 745 (1987), argues that the Challengers' burden is to show unconstitutionality in all applications, otherwise the amended program "must be left in place" to the extent that it has constitutional applications. However, except for a footnote suggesting that students might constitutionally attend sectarian private schools where the tuition charged for a non-program student was not exceeded by the state payment for a student in the amended program, the State has not articulated a rationale that would allow us to declare, on this record, that the amended program "must be left in place" as to some applications.

The State's reliance on certain language in *State ex rel. Warren v. Nusbaum* (*Nusbaum II*), 64 Wis.2d 314, 322-23, 219 N.W.2d 577, 582 (1974), for support of its "partial validity" argument is misplaced. The supreme court commented that constitutional infirmities under the statute there held valid "may arise" and would have "to be determined on [] individual facts." *Id.* But this statement follows the court's conclusion that the posture of the case before it, like this one, required it to analyze the claims made as a facial challenge to the statute:

> Since this action is before this court on the pleadings and stipulation of facts, our decision is necessarily limited thereto. Under the facts we can only determine whether [the statute] is unconstitutional on its face.

Id. at 322, 219 N.W.2d at 582.

The amended program is quite specific as to the students and schools that may participate, how funding is determined and paid, and what restrictions and limitations apply. The agreed upon facts, with attachments, describe the sectarian private schools that have stated an intent to participate. The essential contours of the amended program are well established in the record, and it is the constitutionality of the program as described in this record that we must determine. Had the legislature wished to limit the amended program to certain applications it could have done so, but did not. Like the supreme court in *Nusbaum II*, we can only evaluate the program as enacted and as described in the stipulated record before us. *Id.*

b. Article I, section 18 of the Wisconsin Constitution

We begin by analyzing whether the amended program violates the prohibition against state expenditures for the benefit of religious societies or seminaries contained in Article I, section 18 of the Wisconsin Constitution. We do so, first, because the trial court devoted a major part of its analysis to this issue in its decision and order, and the parties have done likewise in their briefs and oral arguments to this court. Second, beginning our analysis with the state constitutional issue enhances the economy of our effort. The Establishment Clause of the First Amendment allows "more flexibility of interpretation" than does Article I, § 18. *State ex rel. Reynolds v. Nusbaum (Reynolds)*, 17 Wis.2d 148, 165, 115 N.W.2d 761, 770 (1962). Thus, a conclusion that the program fails under Article I, § 18 will obviate a separate First Amendment analysis. *See State v. Miller*, 202 Wis.2d 56, 62-66, 549 N.W.2d 235, 238-39 (1996). By the same token, a conclusion that the program passes muster under the state religious benefit clause would compel the same conclusion with respect to the Establishment Clause of the First Amendment, with little, if any, additional analysis being required.

Notwithstanding the fact that the provisions of Article I, § 18 have been deemed by our supreme court to be less flexible than their federal counterparts in the First Amendment, the State argues that we must import and apply federal Establishment Clause jurisprudence to our analysis of the Wisconsin provisions. If we do so, the State claims that we must arrive at the conclusion that the amended program violates neither constitution because its primary effect is to enhance educational opportunities for disadvantaged students, and any benefit to religion is indirect and incidental. While we have no quarrel with the proposition that we may look for guidance to analyses employed by the United States Supreme Court in Establishment Clause cases:

> Some questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution.

Id. at 64, 549 N.W.2d at 239.

We thus begin by reviewing the text of Article I, § 18, and proceed next to our supreme court's interpretations of its provisions. Even before other authority is consulted, it is apparent that the authors of the Wisconsin Constitution intended to much more specifically curtail what the State may do in its interactions with religion than did the drafters of the Bill of Rights. In lieu of the court directive to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof" contained in the First Amendment, the state text provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of con-

> science be permitted, or any preference be given by law to any religious establishment, or modes of worship; *nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.*

WIS. CONST. art. I, § 18 (emphasis supplied).

That this language goes significantly further than the First Amendment in its prohibition of state support or benefit for religion has been settled law since *State ex rel. Weiss v. District Board of School District No. Eight of the City of Edgerton*, 76 Wis. 177, 44 N.W. 967 (1890), decided some forty years after the adoption of the Wisconsin Constitution:

> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population . . . has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union.

Id. at 207-08, 44 N.W. at 977. (The quotation is taken from a concurring opinion of Cassoday, J., to whom the court's opinion delegated the task of addressing Article I, § 18. It "thus represents the opinion of the court." *Reynolds*, 17 Wis.2d at 165 n.3, 115 N.W.2d at 769.) The principle enunciated in this passage from *Weiss* is as valid today as it was a century ago, having been quoted with approval not only by the *Reynolds* court in 1962, but again last year in *Miller*, 202 Wis.2d at 65, 549 N.W.2d at 239.

The *Weiss* court concluded that reading the King James version of the Bible to students attending a City of Edgerton public school violated the "religious benefit" clause of Article I, § 18. The court interpreted "seminary" as used in the state constitution to mean a school, and its concluded further that:

> The thing that is prohibited is the drawing of any money from the treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text-book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction, and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution.

Weiss, 76 Wis. at 215, 44 N.W. at 980. (The court also held that the Bible readings violated the "compelled support" clause of Article I, § 18, which we discuss below, and the Article X, § 3 prohibition against sectarian instruction in the district schools.) *See id.* at 203-16, 44 N.W. at 976-80.

If reading a Bible to students in the Edgerton Public School converted it into a "religious seminary," for the benefit of which money had been improperly drawn from the state treasury, we fail to see how a different conclusion may be reached with respect to state payments received by sectarian schools under the amended program. The religious missions of many of these schools, and the expressed, purposeful infusion of religion into their curricula, make them religious seminaries within the meaning of Article I, § 18. *See Reynolds,* 17 Wis.2d at 156, 115 N.W.2d at 765 (primary and secondary schools operated by religious organizations or sectarian groups, where some religious instruction is given, are "religious seminaries"). Unless the *Weiss* holding has been narrowed or abandoned, or unless the fact that state checks sent to sectarian schools under the amended program are made payable to the parents of participating students mandates a different result, we are compelled by *Weiss* to invalidate the amended program. As we discuss below, we conclude that the Article I, § 18 analysis in *Weiss* is still good law, and that the amended program cannot be convincingly distinguished.

Our conclusion is fortified by *State ex rel. Reynolds v. Nusbaum,* 17 Wis.2d 148, 115 N.W.2d 761 (1962). The supreme court there reviewed the constitutionality of a state law "to require certain public school boards to furnish transportation to nonpublic school pupils and . . . to require payment of state aids to these school districts on account of such transportation." *Id.* at 150, 115 N.W.2d at 762. The U.S. Supreme Court had previously sustained a similar New Jersey provision against a First Amendment challenge. *See Everson v. Bd. of Educ. of Ewing,* 330 U.S. 1 (1947). The supreme court, however, expressly rejected an invitation to "adopt the construction of [Article I, § 18] of our constitution which the [*Everson* court] placed upon" the Establishment Clause of the First Amendment. *Reynolds,* 17 Wis.2d at 164, 115 N.W.2d at 769. Instead, the court, relying in part on *Weiss*, concluded that the provision of public funds for the transportation of students attending private, sectarian schools violated Article I, § 18. *Id.* at 165-66, 115 N.W.2d at 770.

Although the law reviewed in *Reynolds* referred only to pupils attending "nonpublic schools," the stipulated facts before the court allowed it to conclude that "the private schools which stand to benefit from the act are the parochial schools" and that "the benefit conferred is in reality one confined to those religious groups which operate parochial schools." *Id.* at 158, 115 N.W.2d at 766. The same can be said of the amended program under 1995 Wis. Act 27. Over 70% of the private schools eligible for the amended program are sectarian. The thirty-three nonsectarian schools eligible to participate in the amended program would have been eligible under the original program prior to the enactment of 1995 Wis. Act 27. Whatever benefit to private schools is conferred by the amendments in the Act, is "in reality one confined to those religious groups which operate" the eighty-nine sectarian schools that became eligible to par-

ticipate as a result of the passage of the amended program. *Id.*

The public funds involved in *Reynolds* were not to be paid directly to sectarian schools, or even to these schools by way of restricted payments to the parents of pupils attending them. Rather, the law simply directed public school districts to provide transportation for private school students, via the "regular routes approved for the public school bus," to "the public school which they are entitled to attend." *Id.* at 153 n.1, 115 N.W.2d at 763 (quoting § 40.53(1), STATS., as amended by Laws of 1961, ch. 648). Nonetheless, the *Reynolds* court found a benefit to not only those sectarian schools that were then paying for the transportation of their students, but also to sectarian schools, generally, which stood to "gain through increased enrollment," stating that "an increase in enrollment is a benefit to these parochial schools." *Id.* at 156-57, 115 N.W.2d at 765 (citations omitted).

It seems clear that the sectarian schools participating in the amended program will experience increased enrollment. Except for students below grade 4, students may only participate in the amended program if they were *not* previously attending private schools other than under the program. Section 119.23(2)(a)2, STATS., as amended by 1995 Wis. Act 27, § 4002. The increase from 1500 to 15,000 in the number of pupils allowed to participate, with some 4000 having already applied for participation prior to the suspension of implementation of the amended program, virtually guarantees that many of the eighty-nine sectarian schools eligible to participate in the amended program will experience enrollment increases.

More significant than enrollment increases, however, is the benefit sectarian schools derive from the receipt of state funds which they may expend for any sectarian or nonsectarian educational purpose. These unrestricted payments cannot, under *Reynolds*, be deemed anything other

than a benefit to the sectarian schools participating in the amended program. *See also State ex rel. Warren v. Nusbaum (Nushbaum I)*, 55 Wis.2d 316, 326, 198 N.W.2d 650, 655 (1972) (to be valid, a statute must provide that state payments to sectarian university be used only for secular education). The benefit accrues whether the amount a sectarian school receives for each student enrolled via the amended program is less than or more than the tuition charged for non-program students. In the latter case, of course, an even greater benefit accrues to the religious organization operating the school since the amount of subsidization it must provide to the school is less for a program student than for non-program students.

The State, however, argues that even if it is inescapable that "religious seminaries" are benefited by the expenditure of money drawn from the state treasury under the amended program, it must still be upheld because state and federal precedents, subsequent to *Reynolds,* make it clear that the program is unconstitutional only if a religious benefit is the "primary effect" of the amended program. The State cites the following passage in support of its argument:

> This court has held that ". . . we cannot read [Article I, § 18] as being so prohibitive as not to encompass the primary-effect test. . . ." The applicability of the primary-effect test is to make "[t]he crucial question . . . not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

Nusbaum I, 55 Wis.2d at 333, 198 N.W.2d at 659 (quoting *State ex rel. Warren v. Reuter,* 44 Wis.2d 201, 227, 170 N.W.2d 790, 802 (1969) and *Tilton v. Richardson,* 403 U.S. 672, 679 (1971)). The State's argument is somewhat undermined at the outset in that, even after applying the "primary effect" test, the *Nusbaum I* court invalidated the enactment under review. Notwithstanding the secular purpose of a legislative act to make dental

education available to Wisconsin residents, since it did not restrict the application of the per student aid paid to Marquette University on behalf of Wisconsin students attending its dental school to secular purposes, the court held the Act was unconstitutional under both the U.S. and Wisconsin Constitutions. *Id.* at 332-33, 336-37, 198 N.W. 2d at 658-61.

Nonetheless, we accept the State's premise that, in reviewing the amended program under Article I, § 18, we may, and perhaps even must, consult United States Supreme Court cases applying the "primary effect" test. This test is the second of three parts of the "*Lemon* test":

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."

State ex rel. Warren v. Nusbaum (Nusbaum II), 64 Wis. 2d 314, 322, 219 N.W.2d 577, 582 (1974) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)) (citation and quoted source omitted). Here, as in many Establishment Clause and religious benefit clause cases, the secular purpose of the amended program is virtually conceded: the expansion of educational opportunities for students from low income families in the City of Milwaukee.

No party argues on this appeal that the legislature's "primary purpose" was to funnel money from the state treasury to sectarian schools in Milwaukee; but this does not prevent such an effect of the amended program from being deemed "primary." *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (proper legislative purpose does not immunize act from further scrutiny if it has "a primary effect" to advance religion). In *Nyquist*, the Supreme Court invalidated three provisions of a New York law that: (1) made direct

grants of money to private elementary and secondary schools for maintenance and repair of facilities; (2) partially reimbursed low income parents for tuition costs for their children attending private schools; and (3) provided tax deductions or credits to other parents for children attending private schools. *Id.* at 796-98.

The intended New York tuition reimbursement program closely parallels the amended program here under review. The Court concluded that this part of the New York law failed the "primary effect" test, even though state funds were sent to parents instead of directly to private schools, the "great majority" of which (85%) were sectarian. *Id.* at 768, 783. Transmittal of the state aid via the parents was deemed only "one among many factors to be considered" and did not provide "per se immunity" to the program. *Id.* at 781. The Court declined to make what it labeled a "metaphysical judgment[]" as to whether "*the* 'primary' effect" of the tuition reimbursement program was to "subsidize religion" or to promote "legitimate secular objectives." *Id.* at 783 n.39 (emphasis supplied).

Rather, the Court concluded that the "primary effect" test required only that a reviewing court "ascertain whether [a law found to have a 'primary' effect to promote some legitimate end] also has the direct and immediate effect of advancing religion." *Id.* The Court concluded that the tuition reimbursement program failed the test:

> Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is un-

> mistakably to provide desired financial support for nonpublic, sectarian institutions.

Id. at 783 (footnote omitted). After completing its review of each of the three facets of the New York law, the Court concluded that:

> [E]ach, as written has *a* "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting an establishment of religion."

Id. at 798 (emphasis supplied).

Since Article I, § 18 provides less flexibility for interpretation than does the Establishment Clause, *Reynolds,* 17 Wis.2d at 165, 115 N.W.2d at 770, we conclude that the "primary effect" test, as applied in *Nyquist,* does not undermine our conclusion that the amended program must be set aside on state constitutional grounds. Participation in the amended program is permitted to rise to 15,000 pupils, and private school participating in the program stand to receive upwards of $4000 per student in state payments. Total state payments under the program could thus approach $60 million. If pupil attendance at sectarian schools under the program follows the percentage of private schools eligible to participate which are sectarian (over 70%), or if it mirrors the percentage of attendance at sectarian schools among private school students in the City of Milwaukee (84%), well over $40 million in state payments could be received by sectarian schools. We thus conclude that "a primary effect" of the amended program is the drawing of money from the state treasury for the benefit of religious schools.

The State argues, however, that federal cases after *Nyquist* have moved away from *Nyquist's* broad interpretation of the "primary effect" test, and it urges us to follow these later cases. We decline to do so for three reasons. First, a present member of the Supreme Court has described the Court's "Establishment Clause jurisprudence" as being in "hopeless disarray," and we do not

disagree. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. ——, 115 S. Ct. 2510, 2532 (1995) (Thomas, J., concurring). Second, the cases the State would have us consult do not encompass facts nearly so close to those before us as did *Nyquist*. *See Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota tax deduction for educational costs incurred by students attending both public and non-public schools); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (state vocational rehabilitation aid used by a student to pursue religious vocation at a Christian college); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (sign language interpreter provided under Individuals with Disabilities Education Act to deaf student attending sectarian high school); and *Rosenberger*, 515 U.S. 819 (1995) (student fees at public university used to pay for printing of religiously oriented student newspaper).

Third, if we are to look at federal precedents as an aid in interpreting our state constitution, we must consult those which consider facts close at hand to the controversy before us. *Nyquist* is such a case. Even if we were to speculate that a current majority of the U.S. Supreme Court would not endorse *Nyquist's* treatment of the primary effect test, the case remains precedent unless or until it is overruled by the Court. *See Agostini v. Felton*, 117 S. Ct. 197, 2017 (1997) (if U.S. Supreme Court precedent has application in a case but " 'appears to rest on reasons rejected in some other line of decisions.' " lower court should follow controlling case) (quoted source omitted). (In *Agostini*, decided while the parties were briefing this appeal, the Supreme Court overruled its prior decisions striking down laws in New York and Michigan that permitted public school teachers to go into private sectarian school to provide "supplemental, remedial instruction to disadvantaged children on a neutral basis." *Id.* at 2016. The *Agostini* majority, however, left in place a prior ruling that a Michigan program, under which the State utilized and compensated teachers employed by

sectarian schools to provide certain supplemental classes in those schools, violated the Establishment Clause. *Id.* at 2016-17; *see also* 2019 n.1 (Souter, J., dissenting). *See School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 386-87 (1985) (finding "a substantial risk that, overtly or subtly, the religious message [teachers employed by sectarian schools] are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school.").

Finally, we note that the trial court also concluded that the amended program violated not only the religious benefit clause of Article I, § 18, but the "compelled support" clause[5] as well. The State is critical of the trial court's analysis because, according to the State, "it turns every violation of the religious benefits clause into a violation of the compelled support clause and thereby violates the fundamental principle of constitutional interpretation that related provisions in a document should be interpreted to avoid redundancy." We disagree. When interpreting a provision in a statute or constitution, it is proper, and perhaps even mandatory, that a court consider the language of the entire section at issue, and even that of related sections. *See State v. Barnes*, 127 Wis.2d 34, 37, 377 N.W.2d 624, 625 (1985).

Even though "only a small fraction of the school hours [were] devoted" to Bible reading in the Edgerton Public School, the *Weiss* court concluded that the practice rendered the school room "a place of worship" within the meaning of Article I, § 18. *Weiss*, 76 Wis. at 213, 44 N.W. at 979. Since "taxpayers of the district, were compelled to aid in the . . . support of the school," the court was "very certain" that use of the school as a place of worship was "expressly forbidden by the constitution of the state." *Id.* at 213-14, 44 N.W. at 279. We conclude

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[5] "[N]or shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent. . . ." WIS. CONST. art. I, § 18.

that the materials in the record describing the missions and methods of many of the sectarian schools eligible to participate in the amended program, show that some of them are at least as worthy of being deemed "places of worship" as was the Edgerton Public School in 1890. (E.g., "The Bible forms the core and center upon which all instruction is based. Each day is opened with a devotion followed by instruction in Christian doctrine and Bible study."). And, as we have noted, the amended program creates the potential for some $40 million or more in revenues generated from Wisconsin taxpayers to flow to these sectarian schools.

We do not find it necessary to find in the compelled support clause a separate and distinct ground for the result we reach. Our reading of that clause, however, consistent with the holding in *Weiss*, lends additional support to our conclusion that the amended program violates Article I, section 18 of the Wisconsin Constitution because it directs the payment of money from the state treasury for the benefit of religious seminaries.

Our conclusion that the amended program must be invalidated derives chiefly from the deletion by 1995 Wis. Act 27, § 4002, of the word "nonsectarian" from § 119.23 (2)(a), STATS. We conclude, however, that all aspects of the amended program, 1995 Wis. Act 27, §§ 4002-4009 must be set aside. No party has asked us to sever any part or parts of the amended program from its remaining provisions. We have not, therefore, pursued a separate treatment of the various amendments to the program made in the Act. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (appellate court ordinarily will not consider or decide issues not specifically raised on appeal). Had the legislature been aware that the inclusion of sectarian schools would not withstand constitutional review, it may or may not have elected to increase pupil participation in the program, change the computation and administration of payments to partici-

pating schools, or eliminate the percentage enrollment caps and certain of the monitoring and evaluation requirements. *See Burlington Northern, Inc. v. City of Superior*, 131 Wis.2d 564, 580-81, 388 N.W.2d 916, 924 (1986) (invalid provisions may not be severed when it appears legislature intended provisions to be effective as an entirety and would not have enacted valid part by itself). Should the legislature desire to amend the program to allow additional pupils to attend nonsectarian private schools, or to amend the program in other regards, it should be allowed to do so beginning with a clean slate, that being the original program as upheld in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992).

c. The Free Exercise Claim (Miller Defendants)

The Miller defendants claim that the amended program cannot be invalidated because the "religious school access provided by the [amended program] is mandated by" the Free Exercise of the First Amendment. They argue that the original program violated their right to freely exercise their religion because a government created benefit, public funding for attendance at private schools, was conferred in a "discriminatory manner" by excluding attendance at private sectarian schools. We disagree. We fail to see why the original program represents any more of a curtailment by the State of the Miller defendants' free exercise rights than would be the case had the original program not been enacted. *See Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972) (state provisions to fund public schools and deny funding for sectarian schools do not violate Free Exercise Clause).

As the Jackson plaintiffs note in their brief, many state and federal programs are subject to prohibitions on the use of public funds for religious purposes. These types of restrictions serve the same function as the "nonsectarian" limitation in the original program. While we may have sympathy, as did the *Nyquist* court, "for the burdens

experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience,'" *Nyquist*, 413 U.S. at 788-89, we cannot conclude that the Free Exercise Clause is violated by a limitation designed to ensure compliance with the constitutional constraint that the State not provide a benefit to religious institutions. *Id.*

d. Disposition of Remaining Claims

We have concluded that the trial court did not err in declaring that the amended program violates Article I, section 18 of the Wisconsin Constitution. Accordingly, we, like the trial court, find it unnecessary to address the Challengers' claim that the amended program also violates the Establishment Clause of the First Amendment. By the same token, we decline to address the NAACP's separate claim that the amended program violates the equal protection clauses of the U.S. and Wisconsin Constitutions. The trial court stayed the equal protection claim after it ordered the consolidation of the NAACP action with those of the Jackson and MTEA plaintiffs. The NAACP has argued the claim on this appeal as an alternative ground upon which the amended program might be invalidated. Our disposition makes it unnecessary to address the equal protection arguments. We presume that the NAACP will be permitted to carry forward its arguments should this case engender further review.

We also decline to address the Article IV, § 18 (private or local bill) claim or the claim that the amended program violates Wisconsin's public purpose doctrine, even though the trial court based its invalidation of the amended program in part on these claims. Neither do we find it necessary to review the trial court's conclusion that the amended program survives an Article X, § 3 challenge ("district schools" to be uniform and free of secular instruction). Each of these claims was made regarding the original program and were decided in favor of the State in *Davis v.*

Grover, 166 Wis.2d 501, 480 N.W.2d 460 (1992). The Challengers argue here that the significant expansion in the numbers of pupils and private schools allowed to participate in the amended program; the concomitant increase in state dollars committed to the program; and the elimininations of the private school percentage enrollment caps and of certain monitoring requirements, combine to call into question whether the amended program can continue to withstand the challenges brought in *Davis*.

We defer consideration of whether the amendments to the program are of such a nature and magnitude that the supreme courts conclusions in *Davis* are no longer applicable to the program. Such a review, should it become necessary, is best conducted by the same court that reviewed and sustained the original program. For us to do so here, given our disposition under Article I, § 18, would amount to little more than the rendering of an advisory opinion.

e. The Dissent

The procedural history of this case demonstrates that there can well be fundamental and good faith disagreements among judges when called upon to assess the constitutionality of the amended program. Many, if not most, of the precedents upon which we rely, and others to which we have been referred by the parties, are split decisions of our supreme court and of the U.S. Supreme Court. Chief Justice Rehnquist has noted the difficulty which infuses Religion Clause jurisprudence as follows:

> Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religion Clauses of the First Amendment, since our previous cases arising under these clauses, as the Court notes, "have presented some of the most perplexing questions to come before this Court."

Nyquist, 413 U.S. at 805 (Rehnquist, J., dissenting) (quoting Justice Powell's majority opinion at 760).

There are three principal reasons why we cannot accept the dissent's result and analysis. First, the dissent's analysis is largely based on the premise that if state payments received by a sectarian school under the amended program are limited to a school's incremental costs relating only to the program students enrolled at the school (and hence, in the dissent's view, the school is not being subsidized for costs it would otherwise have incurred), then the amended program violates neither the federal or state constitutions. We cannot agree with either the premise itself or the reading of the provisions of 1995 Wis. Act 27 which it requires as a condition precedent.

The dissent finds support for its premise in *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 263-64, 176 N.W. 224, 228 (1919), which dealt principally with a public purpose doctrine challenge to the Educational Bonus Law, an act which provided educational assistance to returning World War I veterans. The dissent acknowledges that *Atwood's* treatment of the religious benefit issue is not "lengthy." Dissent at 22. In fact, the entire treatment of the religious benefit issue in the case is confined to the four conclusory sentences quoted in the dissent, a passage devoid of any citation to or analysis of the language of Article I, § 18. We agree with counsel for one of the plaintiff groups, who at oral argument commented that labeling *Atwood* as "obscure" would overstate its prominence in Article I, § 18 jurisprudence.

Moreover, the proposition that the prohibitions of Article I, § 18 are satisfied if a religious institution is simply reimbursed for costs it would not otherwise incur, with no restrictions as to the purposes of the costs to which the reimbursement is applied, is contrary to more recent Wisconsin precedents which more rigorously analyze the religious benefit issue. The *Reynolds* court concluded that increased enrollment at sectarian schools, an

effect it found to flow from public funding for transportation to the schools, by itself, constituted a benefit even if the costs being subsidized had not been previously borne by them. *Reynolds*, 17 Wis.2d at 156-57, 115 N.W.2d at 765. And, in *Nusbaum I*, the supreme court concluded that Article I, § 18 would not be violated by "a proper statute" providing state payments to Marquette University to offset dental education costs for state residents, *Nusbaum I*, 55 Wis.2d at 333-34, 198 N.W.2d at 659, but that such a statute *must* restrict payments to that end and not simply allow the payments to offset "operating costs" of the university. *Id.* at 326, 198 N.W.2d at 655.

The supreme court expressed similiar sentiments in *Nusbaum II*, 64 Wis.2d at 326, 219 N.W.2d at 584, where it upheld the purchase of special education services from religiously affiliated providers because the act in question did not provide "aid to the religious as opposed to the secular activities of the private institutions." Specifically, the court noted:

> [T]he legislature has gone to great lengths to insure that the inculcation of religious tenets shall not take place. [A provision in the act] provides that, upon approval by the state superintendent, the private special educational service must be one: "Whose governing board, faculty, student body and teachings are not chosen or determined by any religious organization or for any sectarian purpose."

Id. at 325, 219 N.W.2d at 583. By contrast, not only are the provisions of 1995 Wis. Act 27 devoid of any similar limitations, but the State has stipulated that, under the amended program:

> [T]he State does not prohibit the participating sectarian private schools from using funds received by the school for any purpose the school deems appropriate, including, among other things, the payment of salaries and expenses of employees affiliated with the school's religious mission, the purchase of literature

and other materials identified with the school's religious mission, and the maintenance and construction of facilities used for religious purposes.

Thus, we disagree with the dissent's conclusion that if the amended provisions are construed to limit state payments to sectarian schools to the incremental costs incurred by the schools in admitting program students, the amended program therefore satisfies Article I, § 18. Even under such a construction, the state dollars received by a sectarian school would underwrite the entire "educational programming" for participating students, without restrictions limiting the application of the funds to secular services. We cannot accept the dissent's view that the religious activity "opt-out" provision of § 119.23(1)(c), STATS., cures the constitutional infirmities of the amended program. Dissent at 31. That some parents of students participating in the amended program may have their children exempted from religious activities at sectarian schools does not alter the fact that money drawn from the state treasury would underwrite precisely those activities for other program students.

Equally untenable, in our estimation, is the dissent's adoption of a narrowing construction of the provisions of 1995 Wis. Act 27 in order to preserve it constitutionality. The dissent would have us read the amended program provisions to limit state payments to only "the cost for educational programming related solely to the Parental Choice students." Dissent at 15. The statutory language in question provides that the state funding per student must not exceed "an amount equal to *the private school's operating and debt service cost per pupil* that is related to educational programming, as determined by [DPI]." Section 119.23(4), STATS., as amended by 1995 Wis. Act 27, § 4006m (emphasis supplied). The language of the Act cannot sustain the dissent's proposed construction. A limitation on the per pupil cost reimbursement to those costs associated solely with the admission of program stu-

dents is not to be found in § 4006m, nor in any other provision of the amended program.

None of the parties to this appeal have proposed the construction urged by the dissent, nor have they argued that the reimbursable cost provision applicable to the amended program is ambiguous, as the dissent concludes. In fact, the parties demonstrated a shared understanding of the reimbursable cost provision when they stipulated that under the amended program, "tuition charged by at least a majority of the sectarian private schools that notified the [State Superintendent] of their intent to participate in the amended MPCP during the 1995-96 school year is less than the schools' per-pupil operating and debt service cost." While this court may do so, we have no duty to consider any issues other than those presented to us, and we create " 'real problems [by] addressing unmade claims and developing arguments for one side to a dispute.' " *Swatek v. County of Dane*, 192 Wis.2d 47, 52 n.1, 531 N.W.2d 45, 47 (1995) (quoted source omitted).

Moreover, we are not free to judicially re-write a plainly worded statute in an effort to preserve its constitutionality. *State v. Hall*, 207 Wis.2d 54, 82-84, 557 N.W.2d 778, 789-90 (1997). The dissent does not analyze the per pupil cost reimbrsement provision of the amended program in light of its scope, legislative history, context, subject matter and purpose, which is our customary approach when we deem a statute to be ambiguous. *See Pabst Brewing Co. v. DOR*, 130 Wis.2d 21, 294-95, 387 N.W. 2d 121, 122 (Ct. App. 1986). Rather, the dissent simply declares that the provision "describes only the costs participating schools incur due to educating the Parental Choice students." Dissent at 16. We conclude that we cannot adopt the construction of the Act urged by the dissent, because to do so would require that we "go beyond the province of legitimate construction to save it, and where the meaning is plain, words cannot be read

into it or out of it for the purpose of saving" the amended program. *Hall*, 207 Wis.2d at 82, 557 N.W.2d at 789 (citations omitted).

Our second major difference with the dissent's approach is that, by beginning with an analysis of federal Establishment Clause jurisprudence and resting its conclusions regarding Article I, § 18 on that analysis, the dissent obliterates the separate identity and vitality of the religion clauses of the Wisconsin Constitution. We fear that the dissent's approach repeats this court's error in *State v. Miller*, 196 Wis.2d 238, 538 N.W.2d 573 (Ct. App. 1995), of "overreading" *King v. Village of Waunakee*, 185 Wis.2d 25, 517 N.W.2d 671 (1994). *See State v. Miller*, 202 Wis.2d 56, 62-66, 549 N.W.2d 235, 238-39 (1996). We recognize that *Miller* involved a "freedom of conscience" claim, but the supreme court did not limit its disavowal of this court's conclusion that Article I, § 18 must be construed in the same manner as the First Amendment, to the conscience clauses of § 18. The supreme court's express endorsement of the principles in *Weiss* and *Reynolds*, moreover, demonstrates once more that our supreme court deems the provisions of Article I, § 18, including the religious benefit clause, to be separate and distinct from, and less flexible than, its federal counterparts. *See Miller*, 202 Wis.2d at 65-66, 549 N.W.2d at 239. Thus, unlike the dissent, but as we were instructed by the supreme court in *Miller*, we rest our conclusions on the language of Article I, section 18 of the Wisconsin Constitution.

Finally, we believe that the dissent misinterprets certain aspects of our analysis. The dissent asserts that we have made a factual finding, based on certain excerpts from the stipulated record, that religiously affiliated schools intending to participate in the program will purposefully infuse religion throughout their educational programs. Dissent at 29. The dissent goes on to cite excerpts from the record tending to show that some of the eligible sectarian

schools do not necessarily do so, and that they provide excellent education to their students in secular subjects.

We have two responses to these assertions. First, we did not state, or even imply, that the overtly religious purposes and methods espoused by certain of the eligible sectarian schools were incompatible with excellence in the secular aspects of their programs. Second, and more importantly, the constitutional concern is that nothing in the language of the amended program restricts participating schools from using state funds to support the religious aspects of the curricula at sectarian schools, regardless of whether those aspects are a major or minor part of the educational programming.

On the record presented, it is clear that within the array of schools intending to participate in the amended program, there are those which emphasize their religious mission and methods. While it may be difficult to conceive of a non-secular approach to teaching mathematics, it is not so difficult to envision that history, social studies, or even certain of the natural sciences could be taught from a sectarian perspective. Just as we may not presume that all students participating in the amended program will receive pervasively religious instruction in all areas, neither may we conclude that participaton will be limited to those schools whose approach is "less religious." The problem is that nothing in the language of the amended program ensures that state funding will flow only to the latter and not the former, even if statutory language could be devised that would not run afoul of "entanglement" concerns.[6]

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[6] We did not reach the third, or "entanglement," prong of the *Lemon* test because of our conclusion that the guidance provided under the Establishment Clause analysis in *Nyquist* shows that the amended program fails the second, or "primary benefit" test. If this case turns on "how much religion" infuses the educational programming at participating sectarian schools, as the dissent implies, then the third of the *Lemon* tests would be implicated. *See State ex rel. Warren v. Nusbaum (Nusbaum I)*, 55 Wis.2d 316, 329, 198 N.W.2d

Finally, we disagree with the dissent's characterization of our application of the compelled support clause. We do not rely on that clause as a separate and distinct ground for our holding. Rather, as we stated, we conclude that it is not only appropriate, but perhaps mandatory that we review all of the language of Article I, § 18 to aid us in our interpretation of the religious benefit clause. The compelled support clause, as it was interpreted in *Weiss*, supports our conclusion that the amended program violates the prohibition of § 18, that money not be drawn from the treasury to benefit a religious institution. (We did not, as the dissent implies, conclude that the compulsory attendance prohibition was violated, but rather the compelled taxpayer support aspect of the clause.)

CONCLUSION

For the reasons discussed above, we affirm the trial court's order declaring 1995 Wis. Act 27, §§ 4002-4009, to be in violation of Article I, section 18 of the Wisconsin Constitution.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

650, 657 (1972) (footnote omitted) ("[e]ntanglement . . . is not a matter of [] accounting reports or budgetary controls, but rather surveillance to make sure that religion is not intermixed with the purpose served by state aid.").

ROGGENSACK, J. (*dissenting*). While the majority opinion obviously entailed much thought and effort, I believe its analysis of the constitutional questions presented by this appeal led to an erroneous conclusion, in part because it did not undertake an analysis of the Milwaukee Parental Choice Program (Parental Choice) under the Establishment Clause of the First Amendment before examining Parental Choice under the Wisconsin Constitution. If the majority had done so, I am confident it would not have concluded that Establishment Clause jurisprudence was in "hopeless disarray." Rather, it would have recognized that it provides a well articulated guide, directing where the policies that underlie the Establishment Clause are related to the issues presented by each challenge. To begin the Article I, § 18 analysis in this case with an examination of the Establishment Clause, permits a thorough comparison of the constitutional issues presented by Parental Choice with the standards of jurisprudence necessary to an effective review. Because I conclude that Respondents have failed to meet the burden to prove Parental Choice unconstitutional beyond a reasonable doubt, I must respectfully dissent.

DISCUSSION

First Amendment.[1]

"Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof." So begins the First Amendment to the United States Constitution, with words so simple to repeat, but so difficult to interpret.[2] The Establishment Clause and the Free Exercise Clause may both bear on the same state conduct. As the United States Supreme Court has repeatedly recognized, there is a tension within the religion clauses of the First Amendment itself. The Free Exercise Clause[3] and the Establishment Clause are both written in absolute terms, yet it is impossible to completely permit the former without offending the latter. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973). As a consequence of this internal tension, states which legislate in this area are required to maintain an attitude of neutrality which neither advances nor inhibits religion. *Id.* As the Court explained, "[T]he basic pur-

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[1] The trial court granted summary judgment to the Respondents without addressing the First Amendment challenges. The majority opinion does so as well. However, because I conclude that Parental Choice violates neither the First Amendment of the United States Constitution nor the Wisconsin Constitution, and because a thorough explication and understanding of Establishment Clause jurisprudence is essential to a proper analysis of Parental Choice under Article I, § 18 of the Wisconsin Constitution, it is addressed in this dissent.

[2] The Establishment Clause of the First Amendment has been made binding on the states by the Due Process Clause of the Fourteenth Amendment. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 n.3 (1973).

[3] The Miller defendants base their participation in this lawsuit on the Free Exercise Clause when they argue that without the inclusion of sectarian schools in Parental Choice, their First Amendment rights are violated. Because I conclude that the Milwaukee Parental Choice Program which permits education in a sectarian school is constitutional, I do not reach their argument.

pose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970).

1. Evolution of Establishment Clause Jurisprudence.

As in many areas of the common law, Establishment Clause jurisprudence has developed through years of court decisions which make specific that which the Constitution provides only in general terms. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set out the general structure of the analysis which it has used in Establishment Clause cases since *Lemon*:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[4]

Id. at 612-13 (citations omitted). However, while the principles enunciated in *Lemon* remain well settled, the explication of those principles in varying factual situations shows that a bright line test for Establishment Clause challenges is not possible. In part, this is true because our nation's history has never been one in which the church and the state were completely and absolutely separated. As Justice Powell points out in *Nyquist*, "[i]t has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court." *Nyquist*, 413 U.S. at 760. What the First Amendment requires by way of analysis is a careful examination of the law challenged on establishment grounds to determine whether it furthers the three evils which the Establishment

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[4] This form of analysis will hereinafter be referred to as "the *Lemon* test," with the recognition that is provides a framework for the constitutional analysis of varying issues.

Clause was designed to prevent: state financial support of religion, state sponsorship of religion and the active involvement of the state in religious activity. *Walz*, U.S. at 668.

There have been numerous Establishment Clause challenges to state laws touching upon education. As those challenges have arisen in the context of varying factual patterns, the general contours of the *Lemon* test have been defined more clearly. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court dismissed a challenge to a Minnesota statute which allowed a deduction for state income taxes for the expenses that parents of school children actually incurred[5] for textbooks, tuition and transportation. It was acknowledged that the great bulk of the deductions would go to the parents of those students who attended private schools because public school students were provided free textbooks, tuition and generally free transportation as well. Additionally, ninety-five percent of the private school students attended schools that were sectarian. *Id.* at 391.

The secular legislative purpose of ensuring that the state's citizenry be well educated was clear in *Mueller*. Therefore, the bulk of the Court's decision focused on the second element of the *Lemon* test, that of determining whether the principal or primary effect of the statute was one which neither advanced nor inhibited religion. At the start of its analysis, the Court confirmed that, "[o]ne fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller*, 463 U.S. at 393 (citation omitted). Key to the Court's upholding the constitu-

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[5] This question was reserved in *Nyquist* where the payments to parents were not based on the actual expenses they incurred, but instead were pre-set stipends "occasioned by the growing financial plight of such nonpublic institutions." *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 792 (1973).

tionality of the statute was it religious neutrality, where the beneficiaries of the statute were defined on a religiously neutral ground (*i.e.*, school children) and where no state payments were made directly to any religious schools. The Court recognized that financial assistance provided to parents would ultimately have some economic effect comparable to that of state aid given directly to the schools attended by their children, but it found decisive that the only way in which those sectarian schools could benefit was as the result of "private choices of individual parents of school-age children." *Id.* at 399. Therefore, removing the state from the decision making process about whether the children would attend sectarian institutions was material to avoiding the three evils the First Amendment was designed to prevent.

In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986),[6] a challenge was made to permitting a particular student to participate in a program which provided public funds for special education and/or training in a profession, business or trade, in order to assist visually handicapped persons overcome vocational handicaps and to obtain the maximum degree of self-support and self-care of which they were capable. Witters was suffering from a progressive eye condition which made him eligible under the act, but he was attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington where he studied the Bible, ethics, speech and church administration in an effort to equip himself for a career as a pastor, missionary or youth director. The state denied him assistance because the monies that would have been provided would have passed through him to a religious school. Witters brought suit in state court for a review of the administrative decision denying him aid.

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[6] The scholastic aid survived an Establishment Clause challenge, but on remand, the Washington Supreme Court held it unconstitutional under the state constitution. *Witters v. Washington Dep't of Servs. for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989).

When the state courts affirmed the denial of aid, he appealed to the Supreme Court, which reversed. Justice Marshall, writing for the Court, began with the same basic principle used in *Mueller* when he stated that:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier, and the State may do so even knowing that the employee so intends to dispose of his salary.

Id. at 486-87. The Court also stated that on the other hand, a state may not give a "direct subsidy" to a religious school. The Court defined the question presented in *Witters* as whether the extension of the aid to Witters and then his use of that aid to support his religious education was a permissible transfer similar to the hypothetical salary donation or an impermissible "direct subsidy." *Id.* at 488. The Court concluded that the only way that a religious institution would benefit from the aid given to Witters would be through Witters' personal choice, because the State of Washington's program was made generally available without regard to the sectarian/nonsectarian, or public/non-public nature of the school at which the aid would be spent. Additionally, the Court concluded that giving money to Witters was in no way an incentive for him to undertake a sectarian education. *Id.*

Justice Powell, who was the author of *Nyquist* and concurred in *Witters*, concisely set forth his understanding of the test to be used when evaluating whether the principal or primary effect of payments made to citizens was actually state advancement of religion when he stated that, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v.*

Kurtzman test, because any aid to religion results from the private choices of the individual beneficiaries." *Id.* at 490-91 (Powell, J., concurring). And, in her concurring opinion, Justice O'Connor reiterated that the aid to religion at issue in *Witters* was solely the result of a private choice. The conclusion that a private choice controlled the use of the state aid was important to her because, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Id.* at 493 (O'Connor, J., concurring) (citations omitted). And, it is the State's promotion or restriction of religious practices which the Establishment Clause proscribes, not those of private individuals.

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Supreme Court reviewed Arizona's refusal to provide a sign-language interpreter to a deaf student who attended a private Roman Catholic high school in Tucson, Arizona. Under federal law, and state law, Zobrest would have been entitled to an interpreter as a result of his disability. However, his request was denied because the state concluded that to provide Zobrest with an interpreter in a Catholic high school would run afoul of the Establishment Clause.

In addressing the issues for the Court, Chief Justice Rehnquist began again with a premise similar to those asserted in *Witters, Muellar* and *Nyquist* when he stated:

> We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." . . . . [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8 (citations omitted). When the Court applied the *Lemon* test, it concluded the statute was motivated by a valid secular purpose. In analyzing the second prong of *Lemon* which requires that the principal or primary effect of the law neither advance nor inhibit religion, it reasoned that the statute provided a benefit to a class (deaf children) that was not measured by religious preference, or lack thereof, and that any benefit which a religious school would receive occurred only after Zobrest's parents chose of their own free will to place him in a pervasively sectarian environment. *Id.* at 13. Therefore, it was not the state that was endorsing religion, but Zobrest and his parents. Additionally, the Court concluded that providing an interpreter did not indirectly finance religious education by relieving the sectarian school of costs it otherwise would have borne in educating its students. *Id.* at 12.

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510 (1995), an Establishment Clause challenge was again made in an educational setting. There, the University of Virginia had collected fees and established a Student Activities Fund from which student groups who published newspapers or magazines could retrieve their publication costs. However, a student organization, Wide Awake Productions, which would have been otherwise entitled to publication monies from the Student Activities Fund, was denied those monies because it published a newspaper with a Christian point of view. Wide Awake Productions challenged the University's decision and the Supreme Court agreed with Wide Awake Productions. It held that the University and the courts below had erred by:

> focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian pur-

> poses, then *Widmar*[7], *Mergens*[8], and *Lamb's Chapel*[9] would have to be overruled.

Rosenberger, 115 S.Ct. at 2523. In so holding, the Supreme Court clarified that the benefit received by the recipient must be one that does not inhibit or promote religion and that what the student does with that benefit, even if it is to spend 100% of it on religion-related expenditures, as in *Witters* and *Rosenberger*, does not violate the Establishment Clause. This holding is bottomed on the understanding that forbidding the recipient of the benefit from spending it according to his own personal beliefs would not be religion neutral, but instead would convey a state-approved hostility toward religion. As Justice O'Connor explained:

> [It] would leave an impermissible perception that religious activities are disfavored: "the message is one of neutrality rather than endorsement, if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." . . . Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

Id. at 2525 (O'Connor, J., concurring) (citation omitted).

The most recent Supreme Court pronunciation on an Establishment Clause challenge in an educational context is found in *Agostini v. Felton*, 117 S.Ct. 1997 (1997).

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[7] *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that exclusion of religious groups from university's open forum policy violated the First Amendment).

[8] *Board of Educ. of Westside Community Sch. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990) (holding high school which allowed student secular non-curricular activities to meet on school property was required to provide equal access to a Christian student group).

[9] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding school district violated First Amendment when it denied church use of public school facilities to show film series, solely because it presented a religious view of family values).

There, the Supreme Court overruled its holding in *Aguilar v. Felton*, 473 U.S. 402 (1985), and a portion of its holding in *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), when it held that public school teachers could provide remedial education, guidance and job counseling to eligible students within the confines of private schools, ninety percent of which were sectarian, without contravening the Establishment Clause. In so doing, the Court re-examined the following presumptions which had been operational in *Aguilar* and *Ball*:

> [That] (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

Agostini, 117 S.Ct. at 2010.

The Court concluded that those presumptions were no longer valid because the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect" had changed. *Id.* First, it concluded that allowing state-paid teachers to work in parochial schools does not always result in the impermissible effect of state-sponsored indoctrination, nor does it always constitute a symbolic union between church and state. *Id.* Rather, the neutral eligibility criteria ensure that believers and nonbelievers are treated equally under the statute. Second, the Court discarded the rule that all government aid that "directly aids" the educational functions of religious schools is presumptively invalid. It concluded that when the religious institution is able to benefit from the state program only as the result of an independent choice of a citizen who is eligible for the program, the Establish-

ment Clause is not contravened. *Id.* at 2011 (citation omitted). Third, the Court will no longer presume that when aid is provided to students at the schools of their choice, those services relieve the sectarian school of costs it would otherwise have had to spend in educating its students, even without the program under challenge. *Id.* at 2011-12. Fourth, the constitutionality of an aid program does not depend on the number of sectarian school students who will receive otherwise neutral aid under the program. *Id.* at 2013.

The Court concluded that Establishment Clause analyses should focus on the criteria used by the state to identify the beneficiaries of an aid program because they are relevant to whether the program subsidizes religion and also to whether the criteria create a financial incentive for the recipient to undertake religious education. *Id.* at 2014. The Court reasoned that an "incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

2. Milwaukee Parental Choice Program.

Parental Choice was enacted to broaden the educational opportunities and increase learning for students from lower-income Milwaukee families because these students were among the lowest academic achievers in the state. The beneficiaries of Parental Choice are defined by the economic circumstances and geographic location of the family in which a school-aged child is found. In order to be eligible to participate, child's family may have income no greater than 175% of the poverty level as determined by the federal office of management and budget, reside in Milwaukee; and be otherwise eligible to attend kindergarten through grade twelve.[10]

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[10] For a complete detail of the criteria, see § 119.23, STATS.

Participating private schools may be sectarian or non-sectarian. They must select their students for the program on a random basis, except that they may give preference to siblings of pupils already accepted. The participating schools must be located in Milwaukee and meet all the requisite state and federal laws and codes for accreditation. The private schools cannot require pupils attending under the program to participate in any religious activity. That choice is left to the parents. The parents of participating students are paid "an amount equal to the private schools' operating and debt service cost per pupil that is related to educational programming, as determined by the department," [11] limited by the perpupil amount to which the public school district is entitled under § 121.08, STATS. The checks are sent to the parent's choice of schools and can be cashed only for the cost of the pupil's "educational programming, as determined by the department." Section 119.23(4), STATS.

The case at hand presents a facial challenge to the constitutionality of Parental Choice because it seeks to strike down all possible applications of the act which created it. *Bowen v. Kendrick*, 487 U.S. 589, 600 (1988). Therefore, Respondents must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because the trial court granted summary judgment to the Respondents, there must also be no issues of material fact in dispute. *Lisa R.P. v. Michael J.W.*, 210 Wis.2d 132, 141, 565 N.W.2d 179, 183 (Ct. App. 1997).

This Establishment Clause analysis begins by applying the *Lemon* test. Parental Choice easily satisfies the first prong, with the secular purpose of improving the academic achievement for children from lower-income families.

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[11] The amounts payable under the program are determined by the Department of Public Instruction.

However, the major concerns about the constitutionality of Parental Choice center on the second prong of the *Lemon* test.

The Respondents maintain the statute fails the primary effect analysis of *Lemon*, and thereby violates the Establishment Clause. Respondents assert Parental Choice provides "direct" support to a religious activity, even if the statute were construed to be facially neutral [12] and to have a secular purpose. The Appellants counter that any support received by a religious school is "indirect" because an independent choice by a student's parent is a condition precedent to a religious school's receipt of money; and therefore, the program is constitutional. To which Respondents reply, that even indirect support may contravene the prohibitions of the Establishment Clause.

My analysis of the second prong of the *Lemon* test begins with a recogniton of the basic principles of Establishment Clause jurisprudence which are relied on in *Agostini, Witters, Mueller* and *Nyquist*. First, merely because a social welfare program in some manner aids an institution with a religious affiliation, it does not necessarily follow that the program is unconstitutional. Second, the class benefitted must be described without reference to religion. Third, the nature of the benefit provided must neither be hostile to religion nor provide a religious incentive. In applying the primary effect test, I utilize the directive of Justice Powell that, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91. *See also Agostini*, 117 S.Ct. at 2011-12 and 2014.

Here, the class of beneficiaries is defined by the income levels of the students' families and the geographic loca-

[12] The Respondents do not concede Parental Choice is neutral.

tions in which the students reside. As set out in the statute, the beneficiaries comprise a neutral classification that has no reference to religion. The nature of the benefit provided is the opportunity for additional educational choices for the parents and students of lower-income families. The benefit neither promotes religion nor is hostile to it. Rather, it promotes the opportunity for increased learning by those currently having the greatest difficulty with educational achievement. In so doing, the State leaves the choice of the site of each child's education to his/her parents. It is constitutionally permissible under current Establishment Clause jurisprudence for parents to choose a religious education for their children, even when they are receiving financial payments from the State to fund that choice. *Zobrest*, 509 U.S. at 13; *Mueller*, 463 U.S. at 399. As the Court held in *Witters*, the Establishment Clause is not violated merely because money previously in the possession of a state is conveyed to a religious school. A parent's choice to send his or her child to a religious private school and thereafter to transfer the monies provided under the program to that school does not run afoul of the First Amendment. *See Mueller*, 463 U.S. at 399; *Witters*, 474 U.S. at 486-87; *Rosenberger*, 115 S.Ct. at 2523; *Agostini*, 117 S.Ct. at 2016.

Furthermore, just because the majority of the schools which have applied to participate in Parental Choice are sectarian schools, it does not necessarily follow that the statute is unconstitutional. As the Supreme Court reasoned in *Agostini:*

> Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

> Accord, *Mueller v. Allen*, 463 U.S. 388, 401, 103 S.Ct. 3062, 3070, 77 L.Ed.2d 721 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

Agostini, 117 S.Ct. at 2013, *citing Mueller*, 463 U.S. at 401.

However, repeatedly in cases from *Nyquist* and *Agostini*, the Court's analysis involves consideration of whether the state payments actually supplant costs the sectarian schools would have incurred, even without the program under challenge. Therefore, I consider this factor as well. Section 119.23(4), STATS., provides for state payments to parents equal to the "cost per pupil that is related to educational programming," so long as that cost is not more than the per-pupil payment received by Milwaukee Public Schools. However, § 119.23(4) is ambiguous because it is capable of being understood by reasonably well-informed persons in at least two ways. *D.S. v. Racine County*, 142 Wis.2d 129, 134, 416 N.W.2d 292, 294 (1987). The words "cost per pupil that is related to educational programming, as determined by the department" could mean the cost for the educational programming related solely to Parental Choice students, or the phrase could mean the cost for the educational programming for all students in a given private school divided by the number of students in that school.[13] The record does not reflect whether the latter construction would result in a larger payment to the parents, which they would then spend at a participating school, than would the former construction. And, *Agostini*

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[13] The latter interpretation was urged by counsel for the Jackson plaintiffs at oral argument. Counsel for Parents for School Choice opined that Parental Choice is a remedial program, and it is only the costs the schools incur in providing those services that are paid to the parents.

teaches that courts are no longer free to presume that when aid is provided to students who attend religious schools those monies are supplanting costs the school would have had, even without the program at issue. *Agostini,* 117 S.Ct. at 2013. However, to the extent that such a construction would result in a larger payment that would supplant costs which the schools would have incurred, even without participating in Parental Choice, it must be avoided. This is consistent with the basic maxim of statutory construction which requires that a facial challenge to a statute will not succeed when a limiting construction is available that will maintain the legislation's constitutional integrity. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973).

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld.

Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988). Therefore, I conclude that § 119.23(4), STATS., describes only the costs participating schools incur due to educating Parental Choice students.[14]

I also conclude that Parental Choice passes the third prong of the *Lemon* test because the program does not require excessive state entanglement with religion under the standards established in *Agostini.* Parental Choice requires the Department of Public Instruction to determine the amount of the payment parents will receive, to confirm that the participating schools have complied with all the requisite laws and codes and that they select pupils on a random basis, exclusive of siblings already admitted, and

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[14] This interpretation does not preclude the State from paying *less* than this amount, as indicated by the financial caps stated in the statute.

to monitor student performance. The Legislative Audit Bureau will also perform a financial and performance evaluation audit of the program. All are tasks that will not involve the State in the religious teachings at any sectarian school. And, no Respondent argued that the statutory responsibilities of the State result in constitutional infirmity under the third prong of the *Lemon* test.

The majority contends that *Nyquist* is the Establishment Clause case whose facts most closely resemble Parental Choice; and therefore, *Nyquist,* not more current jurisprudence, determines the outcome in this case. I disagree for two reasons. First, Establishment Clause jurisprudence is an evolving legal concept, where the outlines of the structure necessary to an effective analysis of a constitutional challenge are sharpened and clarified through successive court decisions. Therefore, *Nyquist* must be interpreted and applied with current Establishment Clause jurisprudence in mind. Second, *Nyquist* is factually distinguishable in ways the United States Supreme Court has found significant.

Nyquist examined an act which provided stipends to lower-income families who sent their children to private schools. The stipends were capped by a percentage of the tuition paid, but the amount received was tied to whether the child attended elementary or secondary school, not to the amount the parent paid for tuition. It also provided for tax deductions for higher-income families who did not qualify for the stipends. The deductions were also unrelated to tuition actually paid. The nonpublic schools were characterized by the Court as those which could.

> (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the re-

> ligious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

Nyquist, 413 U.S. at 767-68. In striking down the stipends and tax deductions, the Court concluded that the act had made no effort to maintain a separation between secular and religious educational functions at the private schools. Additionally, it concluded that because the act provided unrestricted cash for the families to use, the stipends and tax deductions operated as impermissible "incentives" that provided "encouragement" to parents to send children to religious schools. *Id.* at 785-86, 791.

By contrast, Parental Choice made significant efforts to separate the secular and religious aspects of the participating schools when it stated that no student was required to participate in *any religious activity* and that the schools were required to select students on a random basis, giving preference only to siblings of students already in attendance. Additionally, the record does not reflect that there is any religious component to hiring of faculty for Parental Choice schools. And finally, the payments received by the parents of Parental Choice students are directly tied to the cost to the school of educating Parental Choice students. Therefore, parents' use of the funds is restricted, providing no incentive for parents to send their children to sectarian schools.

In summation, I conclude Parental Choice does not violate the Establishment Clause of the First Amendment because it offers educational assistance to a class of persons (children from lower-income families) defined without reference to their religion; it provides a benefit (increased educational opportunity) that is religion neutral; any monies which eventually reach a religious institution do so only after an independent choice by a parent; and

the payments made do not subsidize religious institutions for costs they would have incurred, even without participating in Parental Choice.

Wisconsin Constitution.

1. Article I, § 18.

Article I, § 18 of the Wisconsin Constitution formed two bases for the majority's conclusion that Parental Choice was unconstitutional, the benefit clause and the compelled support clause. Article I, § 18 states in relevant part:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

It contains constitutional guarantees of several personal liberties bottomed on the idea of religious freedom.

Often when a statute is challenged on religious freedom grounds, it is challenged under both the First Amendment and Article I, § 18. When that occurs, the Wisconsin Supreme Court has repeatedly stated that, "[w]hile words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion." *State ex rel. Warrent v. Nusbaum*, 55 Wis.2d 316, 332, 198 N.W.2d 650, 658 (1972)[15] (where the *Lemon* test was first employed by a Wiscon-

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[15] This case will be referred to hereinafter as *Nusbaum I*.

sin appellate court in its Establishment Clause analysis); *State ex rel. Warren v. Nusbaum*, 64 Wis.2d 314, 328, 219 N.W.2d 577, 584 (1974);[16] *King v. Village of Waunakee*, 185 Wis.2d 25, 53-54, 517 N.W.2d 671, 683 (1994).

However, the quoted statements do not mean that the protections afforded by Article I, § 18 are identical in all respects to those provided by the First Amendment. *State v. Miller*, 202 Wis.2d 56, 65-66, 549 N.W.2d 235, 239 (1996). And, even though it has been held that if a First Amendment provision involving religious freedom is violated, Article I, § 18 of the Wisconsin Constitution is also violated, *Nusbaum I*, 55 Wis.2d at 333, 198 N.W.2d at 659, it does not always follow that if the First Amendment has *not* been violated, Article I, § 18 has *not* been transgressed. *Miller*, 202 Wis.2d at 65-66, 549 N.W.2d at 239.

Miller, which involved a free exercise of religion challenge brought by members of the Old Order Amish faith, is an example of a difference between First Amendment jurisprudence and Article I, § 18 juriprudence. In analyzing their claim under the Wisconsin Constitution, the Court acknowledged federal law and its past relationship to free exercise challenges under Article I, § 18, but decided not to use the current federal analysis for a free exercise challenge and instead retained the compelling state interest/least restrictive means analysis formerly used in free exercise challenges under the First Amendment.[17] However, it did not create a bright line and hold that *all* challenges to alleged restrictions of religious freedom *must always* be analyzed differently from the anal-

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[16] This case will be referred to hereinafter as *Nausbaum II*.

[17] In 1990, the United States Supreme Court stopped using the compelling state interest/least restrictive means test in cases bottomed solely on a Free Exercise Clause challenge. *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

yses used with parallel challenges under the First Amendment. Rather, it held that:

> *Some* questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution.

Id. at 64 (emphasis added). The analysis used in *Miller* is appropriate for a free exercise challenge, but it is not applicable to the benefit clause and compelled support clause challenges at issue here. Therefore, I examine those challenges using the analytical framework designated by the Wisconsin Supreme Court for the benefit clause and the compelled support clause.

a. Benefit Clause.

The Respondents' benefit clause challenge, at least in some respects, parallels as Establishment Clause challenge under the First Amendment. The benefit clause states: "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." [18]

State ex rel. Atwood v. Johnson, 170 Wis. 218, 176 N.W. 224 (1919), addresses a benefit clause challenge in an educational context.[19] There, the Court considered a law which gave financial stipends to returning World War I veterans to enable them to attend any nonprofit college,

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[18] *Reynolds v. Nusbaum*, 17 Wis.2d 148, 156, 115 N.W.2d 761, 765 (1962), interpreted the terms "religious seminaries," to include parochial elementary and secondary schools (citing *State ex rel. Weiss v. District Bd. of Sch. Dist. No. 8 of the City of Edgerton*, 76 Wis. 177, 215, 44 N.W. 967 (1890)). However, the interpretation that a sectarian school is equivalent to a "religious seminary" was retreated from in *Nusbaum I*, 55 Wis.2d at 335 n.33, 198 N.W.2d at 660 n.33.

[19] The majority opinion does not distinguish *Atwood*, yet its facts most closely resemble those presented by Parental Choice and it is still good law.

vocational school, high school or elementary school in the state, including religious schools. The use of the funds by the schools was not restricted. While not articulating a lengthy reasoning process in reaching the conclusion that the act did not violate the benefit clause, the Court clearly examined whether the payments received by the schools offset the additional costs to the schools which were generated by educating the veterans. It stated:

> The contention that financial benefit accrues to religious schools from the act is equally untenable. *Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed.* They are not enriched by the service they render. Mere reimbursement is not aid.

Id. at 263-64, 176 N.W. at 228 (emphasis added). As has been discussed above in First Amendment context, and as will be discussed below in Article I, § 18 challenges, the concern that a religious school not be compensated for expenses which it would have had notwithstanding the program at issue remains a part of religious freedom jurisprudence. This is so because payment of those expenses may be viewed as subsidizing religion, if the institution's use of the funds is unrestricted. *See Agostini*, 117 S.Ct. at 2011; *Nusbaum* I, 55 Wis.2d at 327, 198 N.W.2d at 655.

In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962), the Court addressed a facial challenge to a statute which provided transportation to and from public schools for all pupils residing in a school district two or more miles from the nearest public school, regardless of whether they attended public or private schools. In coming to its conclusion that an unconstitutional benefit would be provided to parochial schools under the act,[20] the Court employed an analysis which pre-

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[20] The holding in *Reynolds v. Nusbaum* was overturned by the amendment of Article I to add § 23, which provides:

dates the use of the *Lemon* test [21] under federal or state jurisprudence, but which applied criteria very similar to the first two prongs of *Lemon*.

First, the Court in *Reynolds* directed that when confronted with a challenge under the benefit clause, "the *crucial question* is whether the benefits which the parochial schools would receive under the act are *of a category* to constitute a violation of sec. 18, art. I, Wisconsin constitution." *Id.* at 157, 115 N.W.2d at 766 (emphasis added). Second, it examined "category" in two ways: in terms of the specific benefit provided and in terms of the class to which the benefit was directed. The Court listed examples of benefits, such as police and fire protection, that did not run afoul of the benefit clause and concluded they were benefits that were neutral [22] in regard to religion. "[A]ll of these public services and facilities are provided to the public, . . . generally on a basis whereby no classification is made as to religious organizations or schools. It is this which distinguishes these benefits from those sought to be conferred by the instant act." *Id.* It also considered benefits given directly to religious organizations which did not apply to the public generally, such as the tax exemption given to religious or parochial school property under § 70.11(4), STATS. The Court concluded tax benefits were in a category that was neutral [23] because the class to which it applied included all nonprofit organi-

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Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.

21 *Lemon v. Kurtzman* was decided in 1971.

22 Although the Court did not use the term "neutral," it set up the requirement of religious neutrality, both for the specific benefit given and for the characteristics of the class of recipients, if an act was to pass constitutional muster on a benefit clause challenge.

23 See note 18 above.

zations, not simply those affiliated with a religious organization. *Id.* at 158-59, 115 N.W.2d at 766.

As part of its analysis of whether the act provided for a "category" of religiously neutral benefits, the Court found [24] that prior to the act, the parochial schools had paid part, or all, of the cost of transportation of their pupils; and therefore, it was the schools who stood to benefit financially because, by the operation of the new law, they were being relieved of costs they would have had anyway.[25] *Id.* at 156, 115 N.W.2d at 765. Therefore, the specific benefit was not neutral to religion because it subsidized the costs of the religious schools. The analysis used in *Reynolds* is very similar to the primary effect test of *Lemon*, which currently requires religious neutrality in the criteria which define the class of beneficiaries and religious neutrality in regard to the specific benefit provided. *Witters*, 474 U.S. at 490-91 (Powell, J., concurring).

However, of equal significance, when *Reynolds* is examined in light of current federal and state jurisprudence for establishment challenges, the Court concluded the act failed the equivalent of the first prong of the *Lemon* test: It didn't have a valid secular purpose. The Court explained:

> The attorney general argues that this act is sustainable on the basis that the transportation of parochial

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[24] This factual finding of the court is grounded in the stipulation of facts provided by the parties.

[25] It also concluded the religious schools were benefited by increased enrollment. *Reynolds*, 17 Wis.2d at 156, 115 N.W.2d at 765. Apparently this conclusion comes from the Court's assumption that in some parochial schools the parents were required to pay for some of the costs of busing and, if relieved of that expense, more parents would be likely to choose a religious education for their children than would otherwise do so. In so reasoning, it relied on *Judd v. Board of Educ.*, 278 N.W. 200, 212, 15 N.E.2d 576, 582 (1938), which has been overruled. *Board of Educ. v. Allen*, 281 N.Y.S.2d 799, 803, 228 N.E.2d 791, 793 (1967).

> school pupils would promote their health and welfare. It could also be argued with equal plausibility that a direct grant in aid of public funds to parochial schools promotes the general welfare of pupils of such schools because it aids in their education.

Reynolds, 17 Wis.2d at 160, 115 N.W.2d at 767. And lest there be any doubt that the Court in *Reynolds* did not find a valid secular purpose for passing the act, in *Warren v. Reuter*, the Court reiterated that determination:

> In *State ex rel. Reynolds v. Nusbaum* (1962), 17 Wis.2d 148, 115 N.W.2d 761, this court did not accept the declaration of the legislature but determined the purpose of the school bus law in its "realistic operation" was to benefit the private schools rather than promote the safety of children.

State ex rel. Warren v. Reuter, 44 Wis.2d 201, 212, 170 N.W.2d 790, 794 (1969).

In *Nusbaum II*, the Court upheld the constitutionality of a comprehensive act whose purpose was to provide handicapped children with special services to meet their educational needs, even when that purpose was accomplished by school boards contracting directly with religious organizations and paying them to provide educational programs for the children. In analyzing the constitutional challenges, the Court stated, "Initially it must be recognized that the mere contracting for goods or services for a public purpose with a sectarian institution is appropriate state action." *Nusbaum II*, 64 Wis.2d at 324, 219 N.W.2d at 583. This reasoning is consistent with the conclusion set forth in *Atwood*, that if the act simply allows payment for the services a religious organization provides, the money drawn from the treasury is not for the benefit of a religious organization. It is also consistent with the converse proposition stated in *Reynolds*, that if payment supplants costs a religious school would have had notwith-

standing the act, it does have the primary effect of benefiting religion.

King provides the most recent Wisconsin Supreme Court consideration of a benefit clause challenge. There, King claimed a crèche the Village of Waunakee placed in a village park during the Christmas holiday season was unconstitutional. It was contended that village monies were used to erect and maintain the crèche, thereby bestowing a benefit on those of the Christian faith contrary to Article I § 18. The Appellants urged the Court to conclude that *Reynolds* required a constitutional analysis for Article I, § 18 that is different from that used in Establishment Clause cases.[26] But the Court rejected that contention, and it held that, at least for a benefit clause challenge,[27] it would interpret and apply Article I, § 18 in accord with the United States Supreme Court's interpretation of the Establishment Clause. *King*, 185 Wis.2d at 54, 517 N.W.2d at 683.

Therefore, this dissent follows the directive of *King* in analyzing this facial challenge to Parental Choice. As explained above, Parental Choice passes the *Lemon* test, as that test has been explained by the United States Supreme Court. However, that conclusion does not end my analysis, contrary to what is stated in the majority opinion. Wisconsin Supreme Court decisions support my conclusion that Parental Choice does not violate the Wisconsin Constitution.

The majority agrees that the act has a valid secular purpose; but, it defines "benefit" as the money the State

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[26] In the First Amendment section of its analysis, the Court applied the *Lemon* test.

[27] As noted earlier, the Wisconsin Supreme Court departs from the analytical framework used in federal Establishment Clause challenges, when it reviews a free exercise challenge under Article I, § 18.

provides and concludes that religious schools would be "benefited" because they would be paid for the services they provide to lower-income children under the act. There are two errors in that analysis: First, by focusing on the money the State is providing, rather than on the nature of the benefit received by the children, the majority assumes that a recipient of state funds cannot choose to use state funds to purchase services from a religious institution without offending the constitution. This is an incorrect assumption under both Wisconsin and the United States constitutional jurisprudence. *Atwood*, 170 Wis. at 263-64, 176 N.W. at 228 (concluding that veterans may use state-provided dollars to attend religious schools); *Nusbaum II*, 64 Wis.2d at 324, 219 N.W.2d at 583 (concluding that it is constitutionally permissible to use state funds to purchase goods or services from a sectarian institution); *Rosenberger*, 115 S.Ct. at 2523 (concluding that the expenditure of governmental funds is not prohibited simply because those funds pay for a service that is sectarian in some respects); *Zobrest*, 509 U.S. at 8 (concluding that religious institutions are not disabled by the First Amendment from participating in publicly sponsored social welfare programs); and *Witters*, 474 U.S. at 488 (concluding that it is constitutionally permissible for a private citizen to choose to purchase a religious education with government funds).

Second, the majority assumes that when a religious school is paid, it has received public funds for the benefit of a religious seminary. This latter assumption appears to be bottomed in part on the concern that there are no restrictions on how the schools can use the monies they receive and in part on the majority's conclusion that sectarian secondary and elementary schools are "religious seminaries." However, if each school is paid no more than the cost to it of providing educational programming for

Parental Choice students whom it serves,[28] no school will receive a constitutionally impermissible benefit. *Atwood*,[29] 170 Wis. at 263-64, 176 N.W. at 228 (concluding that payment for rendering a service is not a financial benefit to a religious school); *Witters*, 474 U.S. at 488 (concluding there is no constitutional impediment to a Christian college's receipt of monies provided by the government under a social welfare program). And, *Nusbaum II* clearly states, "[T]he court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Nusbaum II*, 64 Wis.2d at 324, 219 N.W.2d at 583. Furthermore, as indicated in note 18 of this dissent, just because a school has sectarian ties, one cannot presume it is a "religious seminary." *Nusbaum I*, 55 Wis.2d at 335 n.33, 198 N.W.2d at 660 n.3.

Another factor on which the majority opinion rests is the determination that the religious mission of the participating schools so infuses every aspect of instruction that state sponsored religious indoctrination is certain to occur. It concludes that, "the sectarian aspects of their educational program are intertwined with the secular subjects;" and therefore, there will be a "purposeful infusion" of religion into all aspects of the education provided. This is a factual determination in regard to how religious affiliated schools will teach secular subjects. In support of this assertion, the majority repeats some mission state-

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[28] It really does not matter whether a school receives more or less than it currently charges students for tuition, so long as the amount paid does not exceed the *school's cost* of providing educational programming for Parental Choice students under its care.

[29] At oral argument, Respondents' counsel argued that *Atwood* was "obscure;" and therefore, of no value in analyzing the case at hand. I disagree. *Atwood* is a decision of the Wisconsin Supreme Court, bottomed on State payments that citizens could choose to use to attend religious schools. Therefore, an appellate court may not ignore it.

ments from the exhibits which were attached to the stipulated facts. However, the same documentation provides the following information which would support an opposite factual determination:

Catholic East Elementary School: "Children of all religions and races are admitted."

All Saints Catholic Elementary School: "All Saints Catholic Elementary School is proud of the broad, multicultural background of its students. Applicants are accepted without regard to race, creed, or ethnic heritage." (Only one religious person is listed on its staff roster).

Blessed Trinity School: The staff is made up of thirteen married women, two women listed after a "Ms." designation, and three men, who are not priests or religious brothers. There is no information provided about their religious beliefs or lack thereof.

"The curriculum incorporates competency based levels of instruction in the reading and math programs and appropriate grade-level instruction in language arts, science, social studies, physical education and the fine arts. The foundation of our education approach stresses the uniqueness of the individual and generates an appreciation for each child's needs and contributions."

Marquette University High School: "Each year 99% of graduates attend four-year colleges and universities. . . . In 1993, Marquette High School recorded 19 National Merit Semi-Finalists."

Devine Savior Holy Angels High School: "DSHA offers a comprehensive and challenging academic program; approximately 95 percent of our graduates attend college. . . . DSHA offers two new state-of-the-art computer labs with 62 fully-configured workstations available to students throughout the day."

Given that information, and much more contained within the exhibits attached to the stipulation of facts, it would be reasonable to infer that the children who would attend these sectarian schools and the professional educators who teach in them would focus on mathematics when they are in math class, on chemistry when they are in chemistry class, and on penmanship when that is the topic of the moment. If they had not done so in the past, the students would not have achieved the academic success shown by the exhibits.

Furthermore, the record before this court does not indicate the religious preference of the teachers of secular subjects in the private schools. Nor was any information provided about the type of textbooks used to teach secular subjects. Drs. Fuller and White's report does show that for the public high schools listed in Table 18, the religious affiliation of the students who attended those schools in 1993-94, differed from that of the institution by as much as sixty percent and the exhibits reflect that children of all creeds are welcomed.

Given the conflicting factual inferences revealed by the record, I am mindful that this appeal occurs after a motion for summary judgment. On this record, a court cannot conclude, as a matter of law, that all subjects that will be taught at sectarian schools will be infused with a religious message. *Vocational, Technical and Adult Education, Dist. 13 v. DILHR*, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46 (1977) (concluding that there must be only one reasonable inference that can be drawn from the facts presented before a factual determination may be made as a matter of law). Furthermore, a presumption that religion would be injected in secular subjects was present in *Ball*, which *Agostini* overturned, instructing that such a presumption may not be valid in each educational institution. *Agostini*, 117 S.Ct. at 2010. The Wisconsin Supreme Court has also concluded that "pervasively sectarian" is a factual determination. "The determination

whether an institution is pervasively religious is to be made with regard to the entire context in which the institution operates." *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis.2d 145, 158, 280 N.W.2d 773, 780 (1979). Therefore, the conclusion that a statute sponsors religious indoctrination now requires a factual record to support it. However, no conclusive factual record exists here.

And in addition, § 119.23(7)(c), STATS., requires the private schools to abide by the choice of each student's parents in regard to whether the student will participate in *any religious activity*. The statute does not limit "religious activity" to that which occurs in religion class. Parents have the choice to opt-out of *all* religious activities. Therefore, I am unwilling to presume, unsupported by a conclusive factual record, that the participating sectarian schools will attempt to violate the clear mandate of the law regarding religious activities, simply because some have a religiously focused mission statement. And, given the holding in *Agostini*, a court should not presume that state sponsored religious indoctrination or a symbolic union between the church and state occurs by virtue of the payments made to parents under the program because it is the parents who choose religion, not the State. *Agostini*, 117 S.Ct. at 2010. That is not to say that there may not be certain participating schools that are so infused with religious messages that even attendance at a mathematics class would constitute religious instruction, but this record is insufficient to determine how the instructions in secular classes are conducted. Furthermore, individual challenges to the constitutionality of the statute are not before this court. *See Tilton v. Richardson*, 403 U.S. 672, 682 (1971) (holding that in deciding on a facial constitutional challenge, it is improper to consider only limited hypothetical applications).

The majority concludes that the benefit clause challenge is controlled by *Reynolds* and *State ex rel. Weiss v. District*

Bd. of Sch. Dist. No. 8 of the City of Edgerton, 76 Wis. 177, 44 N.W. 967 (1890). While I agree that each case provides guidance on the development of benefits clause jurisprudence, neither case is dispositive of this appeal and the majority's reliance on them is misplaced.

First, Parental Choice differs from the busing at issue in *Reynolds* because all parties agree that there was a valid secular purpose underlying the passage of Parental Choice. While in *Reynolds*, the Court specifically concluded that the act was an attempt to benefit private schools rather than to promote the safety of school children.[30] Furthermore, the payments made under Parental Choice program will pay only for the educational programming services Parental Choice students receive. They will not supplant costs that the schools would have had were it not for Parental Choice.[31] Second, later cases have retreated from the broad edicts of *Weiss* when analyzing benefit clause challenges. For example, *Nusbaum I* addresses a change in the definition of "religious seminary" stated in *Weiss*:

> On the corollary point of whether the university here is to be considered as one of the "religious or theological seminaries" in this state, we agree that the university, in all of its operations, cannot be considered as a completely secular institution. However, *Tilton* [32] lessens the reach of earlier decisions of this court [33] insofar as the first amendment is concerned, *and we accept that decision as entirely persuasive, even if not controlling, in establishing a difference*

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30 *See* discussion at p. 25, above.

31 *See* discussion at pp. 15-16, above.

32 *Tilton v. Richardson*, 403 U.S. 672 (1971).

33 *Weiss*, 76 Wis. at 215, and *Reynolds*, 17 Wis.2d at 156, were specifically limited by *Nusbaum I* in regard to their conclusions that religious schools are "religious seminaries" as referenced in Article I, § 18. *Nusbaum I*, 55 Wis.2d at 335 n.33, 198 N.W.2d at 660 n.33.

> *based on function* between various aspects of the university operation.

Nusbaum I, 55 Wis.2d at 334, 198 N.W.2d at 659 (emphasis added). Therefore, I conclude the Respondents have not met their burden to prove, beyond a reasonable doubt, that Parental Choice violates the benefit clause.

b. Compelled Support Clause.

The compelled support clause of Article I, § 18 states, "[N]or shall any person be compelled to attend, erect or support any place of worship." The majority opinion also concludes that Parental Choice violates this clause, mainly due to *Weiss*.

"Compelled support" may be examined in terms of participation or in terms of money. In *Weiss*, it was based on both: participation in a religious activity (Bible reading) that was contrary to the beliefs of some of the students and taxpayers' financial support of the school where the Bible reading occurred. In order to examine the challenge within the words of the constitution, the Court first decided that Bible reading was "worship." *Weiss*, 76 Wis. at 213, 44 N.W. at 980. And, because that participation occurred in school, the Court concluded that the school became a "place of worship," at least for the time when the Bible reading was occurring. *Id.* In concluding that Bible reading violated the compelled support clause, it determined that because taxpayers were compelled to pay for the school through their taxes, they were being compelled to support a place of worship in violation of the religious freedoms guaranteed in Article I, § 18. *Weiss* leaves open the question of whether a school which has religious teaching during a part of its schedule is a place of worship when secular subjects are being taught.

In *Holt v. Thompson*, 66 Wis.2d 659, 225 N.W.2d 678 (1975), the Court examined a statute which provided for released time from public school instruction so that stu-

dents could attend religious education classes. Attendance reports were required from the religious organizations on a monthly basis, as the classes were not conducted in the public schools. In this regard, the challenge focuses on compelled support, in the sense of participation. In holding the act constitutional, the Court noted that: 1) participation in religious education was only "permitted," as attendance was volunatry; 2) the parents chose whether a child would attend religious instruction, not the State; and 3) even though the State did require attendance reports, those reports were not to compel attendance at religion classes, but rather to prevent deception by students who were "heading to the local pool hall." *Id.* at 676-77, 225 N.W.2d at 683. The Court also pointed out that while there might be some application of the statute which would operate to compel a student to attend or support a place of worship, such a challenge could not be made facially to the statute as enacted. *Id.* at 677, 225 N.W.2d at 683.

Parental Choice complies with the principles of *Holt*. It does not require any parent to send his/her child to a religious school. That choice is left to the parents. It does not require participation in any religious activity. That choice is left to the parents. The participating schools are required, notwithstanding any religious affiliation which they may have, to admit students on a random basis, with the limited exception of giving preference to siblings already in attendance. Furthermore, if parents choose to send their children to religious education classes, that is a choice that was approved by the Court in *Holt*, so long as the instruction did not take place in a public school.

Parental Choice also does not run afoul of the holdings of *Weiss* and the later cases which examine the definitions of constitutional terms found in *Weiss*. Parental Choice provides an opportunity for alternate education for children from lower-income families. The only way in which the State can do that is to give the parents money that is

tied to educational opportunity. When that occurs, it does not follow that taxpayers are compelled to support a place of worship. Rather, taxpayers are supporting a social welfare program designed to increase academic achievement for those who need it most. Additionally, if one focuses on the money paid by the State to citizens for social programs rather than on the benefit the citizens receive, one could conclude that many state-funded programs are constitutionally infirm, *e.g.*, state payments for medical care delivered in a religious hospital, state payments for child-care provided in a sectarian nursery and many post secondary educational programs.[34]

Furthermore, the record presented in this summary judgment proceeding is insufficient for this court to conclude, as a matter of law, that the sectarian schools that are eligible to participate are so "pervasively sectarian" that it isn't possible for a parent to choose that his or her child not receive religious instruction. For example, the stipulation of facts provides there were "approximately 89" sectarian schools eligible to participate in Parental Choice during the 1995-96 school year, but the record contains materials from only 51 sectarian schools. No information is provided about the remaining 38 religious schools. There is no information provided about how secular subjects are taught or about the religious persuasion of the teachers who teach them. The factual record presented is just as capable of supporting the conclusion that many of

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[34] Section 39.435(5), STATS., provides educational talent incentive grants which may be used in sectarian institutions. Section 39.44(2), STATS., provides minority undergraduate grants which may be used in religious schools. Section 39.45, STATS., provides grants for higher education, based on need, that can be spent at any public or private nonprofit educational institution. And, § 39.46, STATS., provides for payments to Marquette Dental School, structured to meet the concerns of the Court in *Nusbaum I* where *the only choice* was a religiously affiliated school and the Court required certain assurances that secular and sectarian teachings would not be intermixed.

the sectarian schools teach religion only in religion class, much as mass is said in a Catholic hospital each day, but the hospital also provides quality patient care that is not tied to any religious message, as it is the majority's conclusion that there is a "purposeful infusion of religion" in all subjects.

A complete factual record is critical to this court because *Nusbaum* I directs that we must examine the specific function at issue and the reason for the function before we can conclude whether it is sectarian or nonsectarian. For example, the function of mathematics classes in the sectarian schools and the manner in which they are being taught are questions which must necessarily enter into our consideration of whether an institution is so sectarian that even attendance at mathematics class entails religious indoctrination. *Nusbaum I*, 55 Wis.2d at 335, 198 N.W.2d at 660. Additionally, *Nusbaum I* limits some of the sweeping language in *Weiss* and *Reynolds*, thereby giving further support to Appellants' argument that because parents can choose whether to send their children to a sectarian school in the first instance and can choose to exempt their children from all religious activities, Parental Choice does not result in compelled support of a place of worship.

One must not lose sight of the reason underlying the compelled support clause of Article I, § 18. It is to prevent *the State* from making pro-religion choices for its citizens. It is not to prevent parents from making pro-religion choices for their children. The State must remain neutral in regard to religion, neither preferring nor evincing hostility towards it. Parental Choice maintains that neutrality. To paraphrase Justice O'Connor in *Witters*, no reasonable observer is likely to conclude that by enacting Parental Choice, the State of Wisconsin is endorsing, promoting, compelling or preferring a religious practice or belief. Therefore, on the record before the court, I

conclude Parental Choice has not been proven to violate the compelled support clause.

The majority summarizes its conclusion of a constitutional violation in the statement that the "missions and methods of many of the sectarian schools eligible to participate in the amended program, show that some of them are at least as worthy of being deemed 'places of worship' as was the Edgerton Public School in 1890." As set forth more completely above in this dissent, that statement incorporates a factual finding about how secular subjects would be taught in the sectarian schools that the record does not support. The majority also focuses on money, not on the social program at issue. Social welfare program at issue. Social welfare programs generally involve state funds. Therefore, it is my determination, that on this record, the Respondents have not met their burden of proving Parental Choice violates the compelled support clause, beyond a reasonable doubt in all possible applications.

2. Article X, § 3.

The Respondents also challenge Parental Choice under Article X, § 3 of the Wisconsin Constitution, which states:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Necessary to this challenge is their assertion that any school which receives payments from parents under this program is a "district school" within the meaning of Article X, § 3. The Wisconsin Supreme Court recently ad-

dressed this contention in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992). There, it was conclusively decided that only public schools are "district schools" and that payments directly to the schools which participated in the initial school choice plan did not transform those schools into public schools. *Id.* at 540, 480 N.W.2d at 474. While it is appreciated that there are some differences in the two school choice programs, they are not sufficient to distinguish *Davis*.

3. Article IV, § 18.

The Respondents further challenge Parental Choice as a local bill, under Article IV, § 18 of the Wisconsin Constitution, which states, "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." This provision was designed to: 1) encourage the legislature to devote its time to laws which affect the entire state; 2) be certain the public had the opportunity to know of the subject matter of legislation under consideration; and 3) avoid the appearance of legislative favoritism and discrimination that can occur with laws of limited applicability. *Milwaukee Brewers Baseball Club v. H.S.S.*, 130 Wis.2d 79, 107-08, 387 N.W.2d 254, 266 (1986). Challenges based on an assertion that an act began as a local bill are first examined to determine whether the process by which the bill was passed deserves a presumption of constitutionality and then to determine whether the challenged acts was a private or local bill within the meaning of Article IV. *Davis*, 166 Wis.2d at 520, 480 N.W.2d at 466. There is a distinction between examining the constitutionality of the process which created the legislation and the substance of the law as enacted. *City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 144 Wis.2d 896, 912-13, 426 N.W. 591, 599 (1988).

The process by which Parental Choice was enacted was proper. The bill was not smuggled or log-rolled through

the legislature. It was thoroughly debated on the floor of the Assembly and the Senate and extensive public hearings were held in many locations, such as Milwaukee, Cedarberg, Madison, Portage and River Falls. Interests both for and against Parental Choice had ample opportunity to bring their concerns to the attention of the legislature. Therefore, I conclude that Parental Choice is presumptively constitutional and the Respondents bear the heavy burden of proving a constitutional violation beyond a reasonable doubt.

When examining whether Parental Choice began as a local bill, *Davis* directs consideration be given to: 1) whether it refers to particular people, places or things; 2) whether it involves a prohibited category under Article IV, § 31; or 3) whether it creates a closed classification. *Davis,* 166 Wis.2d at 524-25, 480 N.W.2d at 467-68. The third concern, that of a closed class, is the focus here because only Milwaukee students are eligible at present.

The same challenge was made and decided in favor of constitutionality in *Davis.* The Respondents urge this court to reconsider the issue, notwithstanding *Davis,* because there have been changes in the statute that undermine that holding. I do not agree. The factors which controlled the Court's decision there remain, and if an appellate court is to modify the conclusions reached in *Davis* based on the changes in the current school choice program, that must be done by the Wisconsin Supreme Court. Therefore, I conclude that based on controlling precedent, Parental Choice was not a local bill.

Public Purpose

The Respondents contend that Parental Choice was enacted without a valid public purpose. The public purpose doctrine requires that "public expenditures may be made only for public purposes." *Davis,* 166 Wis.2d at 540, 480 N.W.2d at 474. "[W]hat constitutes a public purpose is in the first instance a question for the legislature

to determine and its opinion should be given great weight." *Warren*, 44 Wis.2d at 212, 170 N.W.2d at 795. And, when public funds are appropriated for use at a private institution, the program must be subject to controls and accountability requirements sufficient to guard the public interests which justify the expenditure. *Id.* at 215-16, 170 N.W.2d at 796. "Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required." *Id.* at 216, 170 N.W.2d at 796.

There is no dispute that improving the academic achievement of lower-income students is a valid public purpose. Rather, the dispute centers on whether the controls are reasonable under the circumstances. I look to *Davis* for guidance in this regard. There, the Court examined controls that require: 1) the private schools to provide their students with an education that complies with § 118.165, STATS.; 2) the quality of the education in regard to student progress be subject to measurable standards; 3) parents to choose for their own children that which is most likely to promote academic achievement; and 4) the cost of the program be restricted. *Davis*, 166 Wis.2d at 542-46, 480 N.W.2d at 475-77. The controls instituted by the legislature for Parental Choice measure up to those found sufficient in *Davis*. First, the schools must comply with all the requirements of § 118.165, STATS. Second, § 119.23(7), STATS., sets forth measurable quality standards. Third, the parents of the children are still making the choice of school for their own children, and fourth, the cost of the program is limited by the scope of its application and by the cost of providing educational programming for the Parental Choice students or the per-pupil amount allocated to Milwaukee Public School, whichever is less. Therefore, I conclude that Parental Choice does not violate the public purpose doctrine.

Equal Protection.

The NAACP Respondents request this court to conclude that its claim that Parental Choice violates the equal protection provisions of the United States and Wisconsin constitutions remains viable and can be proceeded upon, if this court should reverse the circuit court and conclude Parental Choice is constitutional. Because the claims the NAACP made were stayed by the circuit court and because the majority opinion concludes that Parental Choice is unconstitutional, thereby giving the NAACP the relief it seeks, there is no reason to consider the matter further at this time.

CONCLUSION

Parental Choice is a social welfare program which provides educational opportunities (a religion-neutral benefit) to children from lower-income families (a religion-neutral class). Because the money paid to the parents is equal to, and must be spent for, the costs to the participating schools of providing educational programming, the payments do not provide an incentive for parents to send their children to religious schools, rather than keeping them in Milwaukee Public Schools. Additionally, the schools receive no payments "for the benefit of" religious seminaries. The schools receive payments for the educational programming they provide to students who participate in the program.

Although parents can choose to permit their children to exercise this educational opportuntiy in sectarian schools, they can also choose that their children not participate in any religious activities. If certain schools were not to honor that choice, as the majority suggests may occur because of some mission statements, it does not follow that Parental Choice is unconstitutional. Rather, what follows is a recognition that those schools would not be in compliance with the act.

Furthermore, for those students whose parents choose to permit them to attend religion class, a similar choice

was approved by the Wisconsin Supreme Court in *Holt*. That parents are able to make a choice which has a religious component only because of the state payments they receive, is not unique to Parental Choice. Other examples are: 1) the choice a citizen makes when he is treated in a relgiously affiliated hospital, prays with the chaplain each day, and the State pays the hospital's bill; 2) the choice a parent makes to have his/her child cared for in a daycare which is operated by a religious organization, and the State pays the daycare bill; 3) the choice students make to attend sectarian colleges, and the State provides the money to permit that choice pursuant to §§ 39.435 and 39.44, STATS. Neither the federal nor the state constitution is contravened by any of these choices because the State is not advancing religion through the social welfare benefit it provides. It is the individual citizen who chooses to use a state social welfare benefit in a setting that has a religious connection. As Justice Douglas wrote, and as was quoted with approval in *King*:

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

King, 185 Wis.2d at 46, 517 N.W.2d at 680 (citing *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

Because I conclude that Parental Choice neither promotes religion nor is hostile to it, but instead leaves religious choices with the parents where they are constitutionally permissible, I must respectfully dissent.

APPENDIX C

CIRCUIT COURT
BRANCH 17
DANE COUNTY
STATE OF WISCONSIN

Case No. 95 CV 1982

WARNER JACKSON, *et al.*,
Plaintiff,

VS.

JOHN T. BENSON, *et al.*,
Defendant.

Case No. 95 CV 1997

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
Plaintiff,

VS.

JOHN T. BENSON, *et al.*,
Defendant.

Case No. 96 CV 1889

NAACP, *et al.*,
Plaintiff,

VS.

JOHN T. BENSON, *et al.*,
Defendant.

MEMORANDUM DECISION AND ORDER

This case is before the court on a summons and complaint filed by the various plaintiffs contending that defendant, the Sate of Wisconsin, violated the Establishment Clause of the First Amendment of the United States Constitution, Article I, sec. 18 of the Wisconsin Constitution, Article IV, sec. 18 (the "public or local bill" law) of the Wisconsin Constitution, Article X, sec. 3 (the "uniformity clause" law) of the Wisconsin Constitution, and the public purpose doctrine, by creating 1995 Wis. Act 27, secs. 4000-4010, amending sec. 119.23, Stats. (the Milwaukee Parental Choice Program). Plaintiffs seek declaratory and injunctive relief. Defendants contend the Milwaukee Parental Choice Program, as amended, is constitutional under the federal and Wisconsin constitutions.

All parties have filed motions for summary judgment, stipulating that no material fact is in dispute and that they are entitled to judgment as a matter of law. This case is ripe for summary consideration from this court.[1]

Federal and state constitutional provisions are implicated in this case. It is prudent, however, for this court to rely on the state provisions if possible without answering the federal questions. This court does so and does not address any of the federal questions posed by this case. Furthermore, plaintiffs NAACP, et al. raise Article X, sec. 1 objections to the program, which will not be addressed. Finally, defendants/internors Marquelle Miller, et al. claim in defense that should this court strike down

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[1] Plaintiffs NAACP filed their complaint in August, 1996, two days before oral arguments were heard on defendants' motion to lift the preliminary injunction imposed by the Wisconsin Supreme Court. After written arguments, this court consolidated the NAACP complaint with this action but stayed their equal protection claim. The balance of the NAACP's complaint was allowed to proceed since their claims were essentially the same as the other plaintiffs'.

the program, sec. 119.23, et seq., as amended, will violate the federal First Amendment and the freedom of religion or conscience provision of Article I, sec. 18. No specific reference is made to this defense since it is not properly before the court as a claim. And, as you will see, the entire program is found to be unconstitutional.

This court has reviewed all briefs with attachments, given serious consideration to all oral arguments presented, and has examined the law scrupulously. With all of this in mind and for the following reasons this court holds that the amended MPCP violates Article I, sec. 18, Article IV, sec. 18 of the Wisconsin Constitution, and the public purpose doctrine as it is applied to sectarian schools. The amended MPCP does not violate Article X, sec. 3 of the Wisconsin Constitution and the public purpose doctrine as it is applied to nonsectarian schools. Therefore, the entire MPCP as amended is unconstitutional and is ordered to be terminated. However, based on stipulation by all parties, this order is stayed until the close of the 1996-97 school year for all private schools participating in the amended MPCP.

Let us be clear about what is not at issue in this case. Much has been made about whether "school choice" is sound public policy. That concern is best left to the legislature. The scope of this court's role is strictly confined to considerations of possible constitutional infringement. Ours is to interpret and apply the law to facts as they are presented. Ours is not to second-guess the legislature and wear the mantel of policy makers. "School choice" may in fact be sound public policy, especially considering the sad plight of the Milwaukee Public School system. I refuse the urgings to consider policy arguments and, instead, place my sights on the legality of the MPCP, as amended.

STANDARD OF REVIEW

Defendants contend this challenge to the constiutionality of the amended MPCP is a facial challenge since the plaintiffs brought this suit before the program was implemented. If that is the case, "(p)laintiffs must . . . 'establish that no set of circumstances exists under which the [statute] would be valid.'" *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

However, this court does not agree with the defendant's contention that a discussion of the specific application of the amended MPCP statute would merely be a matter of conjecture and speculation rather than established fact. The record is replete with facts. The amended MPCP was implemented after the plaintiffs brought this case. This has given the court ample opportunity to assess the actual operations of the program. Furthermore, both sides have agreed to a stipulated set of facts regarding the program. Thus, this court must judge the constitutionality of the program based on the application of the amended MPCP statute, and the motions for summary judgment will be decided accordingly.

BACKGROUND

Plaintiff ACLU and defendant State of Wisconsin eloquently lay out the background facts in their submissions to this court. Rather than attempt to restate what they so well have already stated, I incorporate relevant portions into this opinion with minor modifications.

A. Milwaukee Schools: An Educational Crisis

It is beyond dispute that the Milwaukee Public Schools (MPS) face the most serious educational challenges in the State. Indeed, the Supreme Court of Wisconsin recognized just a few years ago that "the Milwaukee Public School District has significantly greater education and poverty problems than any other school district in the state." *Davis v. Grover*, 166 Wis. 2d 501, 490 N.W.2d

460, 469 (1992). Moreover, "[t]he statistical data clearly illustrated that the socioeconomic disparities and the educational problems are greater in the large urban area of Milwaukee than any other part of Wisconsin." *Id.* at 529-30; *see also Kukor v. Grover*, 148 Wis. 2d 469, 482-83, 436 N.W.2d 568, 573-74 (1989).

By any measure of educational performance, Milwaukee Public Schools have performed dismally. For example, in 1989, when the original Choice Plan was under consideration, the dropout rate for high-school students reached 14.4 percent. *Davis* at 529. At the same time, the schools in the rest of the state enjoyed the relatively low dropout rate of 3.11 percent. *See id.* at 529. In light of the dropout rates in the MPS, it is not surprising that in 1989 less than 45 percent of MPS students graduated from high school within six years—down from 57 percent just five years earlier. *Id.* at 531. And of those who did graduate within six years in 1989, more than one third did so with a "D" average. *Id.*

The Wisconsin Supreme Court in *Davis v. Grover* found that these realities "dramatically show the need for legislative attention." *Id* .at 529. That legislative attention began with the original Milwaukee Parental Choice Program (the "MPCP" or "Choice Program") enacted in 1989, and continued with the amended MPCP now under challenge. 1995 Wisconsin Act 27, §§ 4002-09 (the "amended MPCP").

B. The Original Choice Program

In the spring of 1990, the Wisconsin Legislature created the Milwaukee Parental Choice Program, which is codified at sec. 119.23, Stats. The Original MPCP provided that "any pupil in grades kindergarten to 12 who resides within the city [of Milwaukee] may attend, at no charge, any nonsectarian private school located in the city," as long as certain requirements were met. *See* Sec. 119.23(2)(a), Stats. (1993-94).

From 1990 to 1994, the MPCP was open to 1% of the membership of the Milwaukee Public School district. For the 1994-95 school year, that percentage was raised to 1.5%—approximately 1,460 students. *See* Sec. 119.23 (2)(b)1., Stats. (1993-94); Agreed Upon Statement of Facts, ¶ 8. To take part in the program, a student's family income cannot exceed 1.75 times the federal poverty level. *See* Sec. 119.23(2)(a)1., Stats. As originally enacted, no more than 49% of a private school's total enrollment could consist of pupils attending under the MPCP. *See* Sec. 119.23(2)(b)2., Stats. (1989-90). That percentage was increased to 65 percent by 1993 Wis. Act 16, sec. 2300.

Under the Original MPCP, the Superintendent of Public Instruction paid participating private schools an amount equal to the per-pupil student aid provided to the Milwaukee public schools. *See* Sec. 119.23(4), Stats. (1993-94). The moneys disbursed under the MPCP are appropriated from general purpose revenues, *see* secs. 20.005(3)(fu) and 119.23(4), Stats., which consist primarily of general taxes collected by the state. *See* sec. 20.001, Stats.

C. The Amended Choice Program

The 1995-96 Budget Act, 1995 Wis. Act 27, which Governor Thompson signed into law July 26, 1995, expanded the MPCP. Most significantly, the Act eliminated the prohibition on participation by religious schools in the MPCP:

> SECTION 4002. 119.23(2)(a)(intro.), 2. and 3. of the statutes are amended to read:
>
> 119.23(2)(intro.) Subject to par. (b), beginning in the 1990-91 school year, any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any **[nonsectarian]*** private school located in the city if all of the following

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[*] Bold bracketed material was struck through on original.

apply: . . . [Bracketed material struck through on original.]

1995 Wis. Act 27, sec. 4002, amending sec. 119.23 (2)(a), Stats.

The Budget Act also enlarged the number of students who can participate in the MPCP. As many as 7% of the Milwaukee school district's pupil population would have been able to participate in the Program during the 1995-96 school year, and up to 15 percent of the student population are eligible beginning in 1996-97. *See id.*, sec. 4003, repealing and recreating sec. 119.23(2)(b), Stats. Based on the 1995-96 Milwaukee School District estimated pupil population of 98,370 students (*see* Agreed Upon Statement of Facts, ¶ 12) nearly 7,000 students could have participated in the expanded MPCP in the 1995-96 school year, with up to 15,000 students potentially taking part in later years. The Act also repealed the restriction in the Original MPCP limiting a private school's enrollment to 65 percent MPCP students. *See* 1995 Wis. Act 27, sec. 4003.

The Budget Act amended the method by which the Superintendent pays tuition to private schools participating in the MPCP. Rather than making the check payable to the school as under the Original MPCP, the Superintendent will now make checks payable to the pupil's parent or guardian. The checks are sent not to the parents, however, but directly to the private school. The parents then must "restrictively endorse the check for the use of the private school":

SECTION 4006m. 119.23(4) of the statutes is amended to read:

119.23(4) Upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the state superintendent shall pay to the **[private school]*** *parent or guardian*, from the

[*] Bold bracketed material was struck through on original.

> appropriation under s. 20.255 (2) (fu), an amount equal to the total amount to which the school district is entitled under s. 121.08 divided by the school district membership, *or an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department, whichever is less.* The state superintendent shall pay 25% of the total amount in September, 25% in November, 25% in February and 25% in May. *The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school.* [Bracketed material struck through on original.]

1995 Wis. Act 27, sec. 4006m, amending sec. 119.23 (4), Stats.

There are no limitations on how private schools, including religious schools, may use the funds they receive under the MPCP. The funds may be used to support all of the educational functions of the school, including religious education, and they may be used to maintain, repair or construct facilities, including facilities used for religious purposes. *See* Agreed Upon Statement of Facts, ¶ 28. As under the Original MPCP, funds paid to schools under the Amended MPCP are drawn from general purpose revenues. *See* sec. 119.23(4), Stats., as amended by 1995 Wis. Act 27, sec. 4006m.

Private schools that participate in the Amended MPC will receive the lesser of the amount of per-pupil state aid to the Milwaukee public schools under sec. 121.08, Stats., or "an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department." *Id.* The per-pupil state aid provided to MPS under sec. 121.08 for the 1995-96 school year was approximately $3,667. *See* Agreed Upon Statement of Facts, ¶ 29. For the 1996-97

school year, the amount is approximately $4,400. *See* Deposition of Deputy State Superintendent of Public Instruction Steven B. Dold, p. 35, included in the Appendix to MTEA's Motion for Summary Judgment.

Under the Amended MPCP, participating schools must allow students to opt-out of "religious activities." The amended statute provides that:

> A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher of the private school's principal a written request that the pupil be exempt from such activities.

Sec. 119.23(7)(c), Stats., created by 1995 Act 27, sec. 4008. Students attending a religious school under the MPCP who have not opted-out may participate, at state expense, in the full-range of religious activities offered by the school.

Furthermore, the amended MPCP eliminated some of the reporting requirements included in the original MPCP. Under sec. 119.23(5)(d), Stats., of the original MPCP, the State Superintendent of Public Instruction was required to prepare and circulate a report to the relevant legislative committees each year. This report compared students participating in the MPCP with students enrolled in Milwaukee public schools in the following areas: "academic achievement, daily attendance record, percentage of pupils suspended and expelled and parental involvement activities of pupils attending a private school." *Id.* The amended MPCP eliminated this requirement. The amended MPCP also eliminated sec. 119.23(9)(a), Stats., which authorized the superintendent to "conduct one or more financial or performance evaluations, audits, or both."

The amended MPCP did maintain some of the reporting requirements, however. The participating schools are still

required to follow uniform financial accounting standards, and must submit to annual independent financial audits under sec. 119.23(7)(am), Stats. In addition, sec. 119.23 (9), Stats., requires the legislative audit bureau to perform a financial and performance evaluation audit of the program by January 15, 2000 which will be distributed to the chief clerk of each house of the legislature and to appropriate standing committees.

D. The Participating Schools

There are 122 private schools in the city of Milwaukee that would have been eligible to participate in the Amended MPCP during the 1995-96 school year. *See* Agreed Upon Statements of Facts, ¶ 24. Of course, 89 are sectarian and 33 are nonsectarian. *Id.*, ¶ 25. Approximately 84 percent of the pupils who attend private schools in Milwaukee during the 1994-95 school year attended religious schools. *Id.*, ¶ 26.

The parties have provided the Court, as part of the Agreed Upon Statement of Facts, the mission statements and other written materials prepared by many of the religious schools that notified the Superintendent of Public Instruction of their intent to participate in the Amended MPCP during the 1995-96 school year. *Id.*, ¶ 27, Exhibit E. The participating schools announce forthrightly that their mission is religious and that religious doctrine will be instilled in their students:

- "Oklahoma Avenue Luthern School in an integral part of the ministry of Oklahoma Avenue Lutheran Church." Exhibit E to Agreed Upon Statement of Facts, p. 535.
- "The mission of St. Leo and St. Rose Catholic schools is to share in the parish evangelization effort through providing quality Catholic education in grades pre-kindergarten through eight." *Id.* at 720.

- "The continuing purpose of St. Matthew Ev. Lutheran Church and School is to go and tell the pure Gospel of Jesus Christ for the conversion of unbelievers and the strengthening of believers in faith and Christian living." *Id.* at 750.
- "St. Pauls Lutheran School exists to:

  —assist parents in training children in God's ways,

  —teach God's Word to children, and

  —make disciples of children." *Id.* at 790.
- "We believe our school exists to carry out the Savior's command to "go and make disciples" (Matthew 28:19). Consequently, our school's primary reason for existence is to be a tool for bringing young souls to faith in Jesus. . . ." *Id.* at 275 (Fairview Lutheran School).
- "A prospective student whose parents are not members of a church will be considered as mission prospects. Christ Lutheran Church/School considers it a responshibility to teach the Word of God to those who have not heard this blessed Word." *Id.* at 198.
- "The objectives of the [Clara Muhammad School] are:

  1. To foster within each student the principle of submissions to the will of Allah (God) as the essential element in achieving human excellence." *Id.* at 227.
- "Holy Redeemer Christian Academy is an integral part of the ministry of Holy Redeemer Church of God in Christ." *Id.* at 399.
- "As a Catholic high school, [Divine Savior Holy Angels High School] is dedicated to promoting the

beliefs and traditions of the Catholic Church." *Id.* at 234.

- "The Yeshiva Elementary School of Milwaukee was initiated by members of the Orthodox Jewish Community with the following objectives as their goals:

  To teach elementary school children Torah and Mitzvos in accordance with the ideals and aspirations of Torah as espoused by the G'Dolei Yisroel in order to provide the excellence in Orthodox Jewish Education which will prepare our children to attend the finest seminaries, Yeshivas and institutions of Jewish higher learning." *Id.* at 966.

- "The function of St. Bernadette Day School is to provide for Christian individuals opportunities for growth in faith, for formation, for development." *Id.* at 614.

- "First and foremost Garden Homes Lutheran Church conducts and maintains a Christian elementary school to assist Christian parents in the training and nurturing of their children in the Word of God." *Id.* at 316.

As the schools' literature emphasizes, one of the primary means by which these schools accomplish their religious missions is by integrating the religious and secular aspects of the schools' educational programs.

- "In keeping with the purpose of our school, our curriculum is taught in the setting of God's Word. Religion is not only taught as a subject, but our teachers have been trained to integrate God's word across the curriculum. . . . Our curriculum offerings place Christ as the focal point for all study." *Id.* at 414, 417 (The Lutheran Chapel of The Cross Church and School).

- "Each class is taught by a dedicated Christian teacher who believes in Biblical concepts of salvation. Teachers strive to build into the curriculum a philosophy of Christian living that includes moral and spiritual values." *Id.* at 471 (Milwaukee Junior Academy (Seventh-day Adventist)).
- "Emmaus Lutheran Church and School is a Christian institution, *NOT* a private school. The Holy Gospel is the center of our curriculum." *Id.* at 259.
- "[E]verything that confronts the child in the educational program offered by St. Matthew Ev. Lutheran School will be presented in the light of His inspired, inerrant word of truth and power." *Id.* at 750.
- "The children will be thoroughly trained in the fundamental subject areas needed for a successful life here on this earth. It is our aim that these subjects be taught in accordance to Scripture and that all things related to the children's educational life be permeated with God's Word." *Id.* at 792 (St. Paul's Lutheran School).
- "Christian teachings are fostered in all classes, but especially in the religion program." *Id.* at 106 (All Saints Catholic Elementary School).
- At St. Veronica Catholic Elementary School, "Christian-Centered Education" means "Integrating Catholic faith in all academic areas." *Id.* at 841.
- "The students of St. Alexander's are not only taught the basic truths of their religion; they are also exposed to the Christian attitudes and ideologies which pervade their school environment." *Id.* at 553.

- "The message of Jesus is taught in religion classes and other curricular areas. . . . Because of the nature of a Catholic school, religion is taught daily as part of the curriculum. Catholic values are also incorporated into all other aspects of the curriculum." *Id.* at 614, 617 (St. Bernadette School).

- "The Bible forms the core and center upon which all instruction is based. Each day is opened with a devotion followed by instruction in Christian doctrine and Bible study. Our school gives due instruction in all branches of academics, which are required by the State of Wisconsin. All subjects are taught by a Christian teacher in the light of God's Word, emphasizing God's love for all men through Jesus." *Id.* at 131 (Bethlehem Lutheran School).

- "All subject areas in our school are Christ-centered." *Id.* at 323 (Gospel Lutheran School).

- "We Believe . . . that the Christian School, where every subject is taught from the Christian point of view, related to the teachings of Christianity and permeated with the spirit of Christianity, can be more successful in leading children to a vital Christian life than any other agency, except the Christian home." *Id.* at 534 (Oklahoma Avenue Lutheran School).

- "We teach all the traditional subjects, but we teach them differently—from a Christian perspective." *Id.* at 526 (Mount Olive Lutheran School).

As noted above, the Amended MPCP pays participating schools the lesser of the schools' per-pupil costs or the amount of the per-pupil state aid provided to MPS under sec. 121.08, Stats., which in the 1995-96 school year was approximately $3,667 and for the 1996-97 school year will

be about $4,400. The tuition charged by a majority of the religious schools that have applied to participate in the Amended MPCP, however, is less than either of those amounts. *See id.*, ¶ 30. As a result, a majority of the participating religious schools will receive more money from the state for each participating pupil than they charge in tuition.

Holy Cross School, for example, charges tuition of $1,475, while its "actual cost of education" is $2,446 per student. *See id.*, Exhibit E., p. 388. Emmaus Lutheran School charges $1,080 tuition to church members and $1,350 nonmembers, though its annual expenditures exceed $2,000 per pupil. *Id.* at 261. Mother of Good Counsel School reports that its tuition ($1,370 for parish members, $1,940 for nonmembers) "covers just half the cost of educating MGC students." *Id.* at 489, 497. Mount Olive Lutheran School states that the tuition charged even to non-members is "substantially less than our per pupil cost." *Id.* at 526.

Many religious schools depend on subsidies from their sponsoring churches to make up the difference between tuition and operating expenses. Bethlehem Lutheran School, for example, reports that "Bethlehem Lutheran Church subsidizes nearly 50% of the cost per student." *Id.* at 130. Mount Olive Lutheran School states that "Mount Olive congregation provides the major support since the focus of our school is Christian education." *Id.* at 526. St. Catherine School says that it "is partially subsidized by the parish at large." *Id.* at 663.[2] Because the

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[2] One of the most detailed descriptions of the support provided by a sponsoring church to its school comes from St. Bernadette Parish Day School:

> "2. St. Bernadette Church contributes without charge to the day school program the use of all parish buildings, facilities, and grounds, as well as all maintenance and repair

Amended MPCP pays schools more than what they charge in tuition, the Choice Program relieves the churches that sponsor the schools of at least part of the cost of subsidizing the difference between tuition received and the actual cost of education.

DISCUSSION

Article I, Sec. 18 of the Wisconsin Constitution

Plainttiffs' first claim the amended MPCP violates Art. 1, sec. 18 of the Wisconsin Constitution, which provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment, or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Plaintiffs' claim focuses on two provisions: ". . . nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent;" and ". . . nor shall any money be drawn from the

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costs ($22,489.78 last year); the cost of all utilities, ($38,-379.10 last year); building and grounds liability insurance, inspection fees, and licenses, ($11,370.76 last year); and the services of all parish based personnel, namely, the pastor, pastoral associate, parish secretary, and building engineer.

3. St. Bernadette Church provides a yearly cash subsidy to assist the day school program with school based expenses . . . not to exceed 25% of the total cost of all school based expenses. Last year the cash subsidy in behalf of the day school program was $66,140.36."

treasury for the benefit of religious societies, or religious or theological seminaries." These two provisions are commonly referred to as the "compelled support" clause and the "benefit" clause, respectively. Each clause will be discussed in turn.

A. The Benefit Clause

The proper analysis for determining whether the amended MPCP is constitutional as to the sectarian schools is set forth in the seminal United States Supreme Court decision of *Lemon v. Kurtzman*, 403 U.S. 602 (1971): The statute must have a secular legislative purpose; its primary effect must neither advance nor inhibit religion; and it must not foster excessive governmental entanglement with religion. *Id.* at 612-13. *See also, Tilton v. Richardson*, 403 U.S. 672 (1971); *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W.2d 650, (1972); *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145, 280 N.W.2d 773 (1979). Our concern in this case is whether the primary effect of including sectarian schools in the amended MPCP advances religion. I conclude that it does.

In an attempt to give some organization to the Wisconsin cases applying the *Lemon* test to Article I, Sec. 18 controversies, I provide the following analytical framework. We look to three factors to determine whether the amended MPCP meets the "primary effect" prong of the *Lemon* test as it is applied in Wisconsin:

1. Does the legislation provide aid to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or it funds a specifically religious activity in an otherwise substantially secular setting[3]. *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 325, 219 N.W.2d 577 (1974);

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[3]A possible 4th factor exists, neutrality, which is part of the U.S. Supreme Court's jurisprudence in Establishment Clause claims.

2. Does the legislation provide for *direct* governmental aid to a sectarian institution. *State ex rel. Reynolds v. Nusbaum,* 17 Wis. 2d 148, 115 N.W.2d 761 (1962); and

3. Who are the primary beneficiaries of this funding. *Id.*

Each factor will be discussed in turn. However, before we do that, it is necessary to clarify the scope of this court's analysis of Article I, Sec. 18 in light of federal court decisions interpreting the Establishment Clause of the First Amendment.

At issue is whether the language of Article I, Sec. 18 provides an independent and more prohibitive basis for review of "benefit" clause and "compelling support" clause claims than is provided by federal jurisprudence of the Establishment Clause of the First Amendment. Based on a review of the historical context within which Article I, Sec. 18 was created and how it has been interpreted in the past 107 years I conclude it does.

A usual starting point for this type of discussion is a review of the legislative history to determine the intent of the framers. As noted by Chief Justice Heffernan in his dissenting opinion in *King v. Village of Waunakee,* 185 Wis. 2d 25, 64, 517 N.W. 2d 671 (1994), the record of the 1847 constitutional convention provides little if any insight into the framers' intent when they created Article I, Sec. 18. *See,* 4 *Constitutional Series: The Attainment of Statehood* 228, 312, 334, 713-5 (Milo M. Quaife ed.

The Supreme Court employs this analysis separate from the *Lemon* test. Defendants argue the application of the neutrality analysis to Article I, sec. 18 because they believe Wisconsin courts are bound by all aspects of the U.S. Supreme Court's Establishment Clause analysis when interpreting Article I, sec. 18. As discussed below, this court rejects defendants' argument and does not apply the neutral legislation analysis to the facts of this case. Furthermore, no Wisconsin court has applied the neutrality analysis to Article I, sec. 18 claims.

1928). We must, therefore, look for an early case where the Wisconsin Supreme Court interpreted and applied Article I, Sec. 18.

State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890) served as the Wisconsin Supreme Court's opportunity to investigate the historical context within which Article I, Sec. 18 was created. *Weiss* also provides us with a first glimpse at how the pioneers of our courts construed this important constitutional provision.

At issue in *Weiss* was whether reading a Protestant Bible in the Edgerton schools constituted sectarian instruction in violation of Article X, sec. 3 and whether it infringed upon the right of Catholics the free exercise of their conscience in violation of Article I, Sec. 18. The *Weiss* court explained rather elaborately the historical context of the creation of Article I, sec. 18:

> The relations of church and state have been the subject of discussion for many centuries; and at certain times, and in certain nations of Europe, one particular sect has been the established church of the state, and at other times or in other nations the belief of some other sect has been the established religion—while other sects, not so favored, were either exterminated altogether or permitted to remain on conditions more or less disagreeable and humiliating. These discriminations naturally generated bitternerss, enmities, and even cruel war among brethren. Many of the early immigrants to this country had felt the despotism of such intolerance, and came hither in consequence of it. They came from different countries of Europe, and, consequently, had experienced different types of intolerance. Some of them were as narrow minded in such matters as their oppressors had been; and hence no sooner acquired civil power than they

> themselves became intolerant towards all sects except their own. . . .
>
> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, . . . has in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union.

Id. at 205, 207-208. It is undoubtedly clear that the *Weiss* court was signaling to all concerned that in response to Wisconsin's unique history, the constitutional framers intended to provide strict protection to Wisconsin citizens in the exercise of their religious beliefs while at the same time placing great restrictions on the state with respect to compelling its citizens to support "any place of worship" and drawing funds from the treasury "for the benefit of religious societies, or religious or theological seminaries." *Id.* at 211-216.

The Court ruled that reading the Bible in public schools is "worship" within the meaning of the "compelling support" clause. *Id.* at 213. The Court further ruled that the school room in which the Bible is read is a "place of worship." *Id.*

The *Weiss* court further ruled that religious instruction in a public school renders that school a "religious seminary" within the meaning of Article I, Sec. 18. The Edgerton school district received state funds and because of that the Court found that "the money so drawn from the state treasury was for the benefit of religious schools," in violation of Article I, Sec. 18. *Id.* at 215.

The Wisconsin Supreme Court elaborated on *Weiss* in the case of *State ex rel. Reynolds v. Nusbaum,* 17 Wis. 2d 148, 115 N.W. 2d 761 (1962). In *Reynolds* plaintiffs claimed the state violated Article I, Sec. 18, the "benefits"

clause, when it enacted a statute requiring school boards to provide private school students with free transportation to and from the nearest public school. Following in the footsteps of *Weiss*, the *Reynolds* court construed "religious societies" to be synonymous with "religious organizations," and that the term "seminary" includes elementary and secondary schools. *Id.* at 156, (cites omitted). The Court concluded that the private schools involved were religious organizations and therefore "religious seminaries" within the meaning of Article I, Sec. 18. Finding that the private schools benefit from the state providing State funded transportation to private parochial school students, the statute was held to violate Article I, Sec. 18.

The *Reynolds* court was cognizant of the earlier U.S. Supreme Court decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court upheld a New Jersey law permitting parental reimbursement for the cost to bus children to parochial schools, finding no violation of the Establishment Clause of the First Amendment. The *Reynolds* court rejected an argument by the Wisconsin Attorney General urging it to adopt the *Everson* analysis and apply it to Article I, Sec. 18, quoting from *Weiss* and holding "that the First amendment provision, which prohibits laws' respecting an establishment of religion,' lends itself to more flexibility of interpretation than the provision contained in the last clause of Sec. 18, Art. I, of the Wisconsin Constitution." *Id.* at 165.

The import of *Reynolds* lies in its clear pronouncement that Article I, sec. 18 provides greater limitations on the state's authority when providing aid to private religious schools than the First Amendment. This part of the *Reynolds* opinion has not been overruled by any subsequent decision.[4]

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[4] Defendants argue *Reynolds* has been repudiated as reflected by the evolution in Establishment Clause and "benefit" clause jurisprudence. No such clear pronouncement is articulated in any Wis-

In *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 170 N.W. 2d 790 (1969), the Court adopted the primary effect test which it noted was first announced in *Everson*, 330 U.S. 1. *Id.* at 227. The Court rejected an argument by the respondent that *Reynolds* rejected the primary effect test, explaining, "(g)ranting that Sec. 18, Art. I, of the Wisconsin Constitution is more prohibitive than the First Amendment of the federal constitution, it does not follow and we cannot read Sec. 18 as being so prohibitive as not to encompass the primary—effect test." *Id.*

This is the first case where the Court acknowledges the more prohibitive limitations of Article I, sec. 18 as opposed to the First Amendment, while adopting the primary effect test. Obviously, the *Warren* court found the two concepts congenial, as not in conflict with the other. *Lemon* had yet to be decided. Still, in Wisconsin it was clear that Article I, sec. 18, even when applying the primary effect test to it, afforded greater prohibitions than the First Amendment against state funding of private religious institutions.

The *Lemon* decision was handed down by the United States Supreme Court in 1971, as well as *Tilton v. Richardson*, 403 U.S. 672 (1971), wherein the *"Lemon"* test was adopted. The Wisconsin Supreme Court in *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W. 2d 650 (1972) ("Nusbaum I") had its first full opportunity to comment on and apply the *Lemon* test to First Amendment claims. The court noted: "We are bound by the results and interpretation given the first amendment in these high court decisions (referring to *Tilton* and *Lemon*). Ours not to reason why; ours but to review and apply. That limited assignment is not made easier by apparent shifts in emphasis and differences between major-

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consin "benefit" clause or "compelled support" clause opinion. Hence, *Reynolds* is still good law in Wisconsin on this important point.

ity, plurality, concurring and dissenting opinions." *Id.* at 322.

In "Nusbaum I" a statuate was challenged which authorized a contractual relationship between the state and the School of Dentistry of Marquette University for the providing of dental education in the state's only dental school. The statute authorizing the contract placed no limitations on how the state funds were to be used. Some of the funds would go to Marquette University for its operating expenses, which conceivably could include expenditures made in support of its religious mission. A claim was brought under the First Amendment and Article I, Sec. 18.

The primary effect test was applied in "Nusbaum I" and the statute at issue was found unconstitutional. The court first recognized the "dual purpose" nature of the First Amendment and Article I, Sec. 18 religious provisions: prohibiting the "establishment" of religion and protecting the "free exercise" of religion. The court found the statute in the first instance, unconstitutional under the First Amendment, and hence unconstitutional under Article I, Sec. 18. No thorough discussion was undertaken concerning the stronger prohibitions of Article I, Sec. 18, nor did the Court employ a separate analysis under Article I, Sec. 18 as did the Court in *Reynolds* and *Weiss*. The court merely reiterated the accepted rule that "The crucial question . . . is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion. *Id.* at 333, quoting from *Tilton, Supra* at 679.

In *State ex rel. Warren v. Nusbaum,* 64 Wis. 2d 314, 219 N.W. 2d 577 (1974) ("Nusbaum II"), the court upheld the constitutionality of a law that required school districts to contract with private schools offering special education services to children with exceptional needs if those services could not be provided by public schools

or agencies. One significant restriction in the law, which is notably absent from the amended MPCP, was the governing board, faculty, student body and teachings of the private special education agency could not be "chosen or determined by any religious organization or for any sectarian purpose." *Id.* at 321. The court, referring to the secular nature of the service, held that the primary effect of the legislation was not to benefit religious organizations. *Id.* at 325-26.

Similar to *Nusbaum I*, the court in *Nusbaum II* applied the primary effect test first under the federal constitution. Having found no violation under the federal constitution the court had no difficulty finding no violation under the Wisconsin Constitution. Again, no independent analysis was undertaken of the more strict prohibitions of Article I, sec. 18. However, the *Nusbaum II* court was the first court in Wisconsin to state the following proposition:

> "Aid may normally be thought of as having the primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . ."

Id. at 325.

What follows from *Nusbaum I* and *Nusbaum II* are a line of cases involving the "benefits" clause where the court defers to federal jurisprudence generally, not exercising its right to determine the constitutionality of laws under the more strict provisions of Article I, Sec. 18, independent of the First Amendment. In these cases the Court simply applies Establishment Clause-primary jurisprudence to Article I, sec. 18 claims after first finding no violation of the federal constitution. The Court does not specifically, or implictly, reject the independent analysis of Article I, sec. 18 jurisprudence, as supported by *Weiss, Reynolds,* and *Warren. See, State ex el. Holt v. Thompson,* 66 Wis. 2d 659, 225 N.W. 2d 678 (1975) (a writ of mandamus petition challenging the constitu-

tionality of the "released time for religious instruction" act); *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145, 280 N.W. 2d 773 (1979) (involving an act creating the "Authority" which finances improvements for private, nonprofit health care facilities through the sale of tax-exempt bonds; the primary effect of the act under the federal and Wisconsin constitutions was to provide aid to predominantly secular aspects of health care); *Freedom From Religion Foundation, Inc. v. Thompson*, 164 Wis. 2d 736, 476 N.W. 2d 318 (Ct. App. 1991) (an action challenging a legislative grant to St. Norbert College); *King v. Village of Waunakee*, 185 Wis. 2d 25 (1994) (an attack on a Christmas creche located on government property and maintained at government expense). However, in *State v. Miller*, 202 Wis. 2d 56, 549 N.W. 2d 235 (1996), the court reestablished in a firm and unequivocal way, the old rule established in *Weiss* and *Reynolds* that as to cases invoking the freedom of conscience provision of Article I, Sec. 18, its analysis, "is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision." *Id.* at 66. The court held "that our state constitution provides an independent basis on which to decide this case." *Id.*

In *Miller* the court explained:

> Nowhere in *King* did we hold that Article I, sec. 18 is subsumed by the First Amendment. Although we quoted with approval the court of appeals' comment that because both clauses serve the same dual purpose we will interpret our provision "in light of United States Supreme Court cases," that statement should not be read as an abandonment of our long-standing recognition that the language of the two documents is not the same. Some questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates

> of the more expansive protections envisioned by our state constitution.

Id. at 63-64.

The freedom of conscience or religion provision of Article I, sec. 18 was the primary issue in *Miller*. Defendants argue a narrow interpretation of *Miller*, stating the Court's reiteration of the increased protections of Article I, sec. 18 are confined to freedom of conscience claims. A careful reading of *Miller* and its reasoning leads this court to a different conclusion.

The Court in *Miller* firmly repudiates any attempt by legal scholars and practitioners to read into *King* precisely what defendants are urging upon this court. The Court explains:

> Contrary to the reading ascribed to the *King* majority by both the dissent in that opinion (*King*, 185 Wis. 2d at 59-60) and the court of appeals in this instance (*Miller*, 196 Wis. 2d at 245), we did not repudiate a reading of the Wisconsin Constitution which provides stronger protection of religious freedom than that envisioned in the federal constitution. (footnote omitted). In fact, we explicitly stated that we reached our conclusion given the specific facts in *King*, "even assuming that" our state establishment provision might be " 'less flexible' than the First Amendment." (cites omitted).

Id. at 64. Article I, sec. 18 was implicated in *King* as well as the Establishment Clause of the First Amendment. It is clear that the Court in *King*, which the *Miller* Court clearly acknowledged, examined Article I, sec. 18 and determined that its more rigid protections against government support of religion did not preclude the erection and maintenance of a christian creche on government property. This is a clear signal that this Court still recognizes the "less flexible" nature of Article I, sec. 18 in relation to the

Establishment Clause of the First Amendment, and supports an independent analysis of "benefit" clause and "compelled support" clause claims under the Wisconsin Constitution.

We have every reason to extend the courts reasoning in *Miller* to all provisions contained in Article I, Sec. 18. First, those parts in *Weiss* and *Reynolds* finding and applying the greater restrictions in "benefits" clause and "compelled support" clause cases have not been overruled, implicitly nor explicitly. Secondly, the "state's unique history" as recognized by the drafters of our constitution applies equally to all portions of Article I, Sec. 18. Third, consistent with the need to evolve with changing times, we have observed in the past four to eight years a major effort to empower the states to determine their own destiny. Wisconsin has a strong constitution that has provided through time greater protections to individuals in the exercise of their religion while imposing clear constraints on the state's authority to provide financial aid to sectarian schools, agencies and organization.

I conclude, therefore, that there is an independent basis to analyze "benefit" clause and "compelled support" clause claims under Article I, sec. 18. While it is fruitful and prudent to interpret this provision "in light of United States Supreme Court cases," we are not bound by federal jurisprudence when analyzing our own constitutional provisions. We now move to an independent analysis of the ameded MPCP under Article I, sec. 18.

Factor 1: Does the legislation provide aid to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or it funds a specifically religious activity in an otherwise substantially secular setting? The answer is yes.

In *Weiss* and *Reynolds* the Court stated elementary and secondary schools providing religious or sectarian instruc-

tion are "religious seminaries" as that term is used in Article I, sec. 18. There is no dispute that the sectarian schools wishing to participate or which currently participate in the amended MPCP are "religious seminaries." There is also no dispute that the amended MPCP would provide state funds from the state treasury to those schools should the program be allowed to continue. The question before us is can these schools separate the secular activity of education from the nonsecular activity reflected in their religious missions.

Wisconsin and federal courts have generally acknowledged that elementary and secondary schools with a religious affiliation are pervasively sectarian. *See State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145, 156-57, *See also, Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). "The basis of this distinction is the recognition that the very purpose of many elementary and secondary schools is to provide an integrated secular and religious education. The schools are often devoted to the inculcation of religious values. *Wisconsin Health Facilities Authority*, at 156-57, citing *Meek*, 421 U.S. at 366.

In the first instance, we can assume as a matter of law that the elementary and secondary schools wishing to participate in the amended MPCP are pervasively sectarian. *Wisconsin Health Facilities Authority*, at 156-57. Then, when we review the stated missions of these schools as provided in the stipulated facts, their intent to inculcate their students with their religious doctrine is manifest. It is equally clear that it is impossible, under any scenario, for these schools to separate the secular function of education from their religious mission. Their very existence is to convert students to their religion and to proselytize their doctrine. We can easily conclude that the amended

MPCP would provide aid to institutions in which religion is so pervasive that a substantial portion of their functions are subsumed in their religious mission.

Factor 2: Does the legislation provide for direct governmental aid to a sectarian institution? The answer is yes.

This is perhaps the most controversial of the issues presented in this case. Plaintiffs argue that although the amended MPCP provides for "indirect" payments to the schools, direct government aid is still being provided to the religious schools. Defendants point to a long line of federal cases that stand for the proposition that government payments to parents to subsidize their child's education is "indirect" aid to the schools, thus not violative of the Establishment Clause.[5] This conclusion is buttressed by the ability of the parents to independently choose the schools at which their child will attend. In this case the parents choose the school and inform the state Superintendent. The state Superintendent sends a check directly to the school which must be restrictly endorsed by both the school and the parents.

It can hardly be said that this does not constitute direct aid to the sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth. Millions of dollars would be directed to religious institutions that are pervasively sectarian with a clear mission to indoctrinate Wisconsin students with their religious beliefs. Whether sent directly to the schools or sent directly to the schools with a mandate of restrictive endorsement by the parents, is irrelevant under Article I, sec. 18 which makes

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[5] *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 115 S.Ct. 2510 (1995); *Zobrest v. Catalina Foothilss Sch. Dist.*, 113 S.Ct. 2462 (1993); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); and *Muller v. Allen*, 463 U.S. 388 (1983).

no distinction as to how the "benefit" is provided. As stated earlier in this case, the state cannot do indirectly what it cannot do directly. And that is provide money from the state treasury to pervasively sectarian religious schools for the purpose of educating Wisconsin students.

Factor 3: Who are the primary beneficiaries of this funding?

The religious schools would be the primary beneficiaries of the government aid. The parents of students attending these schools will certainly gain a benefit. Indeed, such aid provides an inducement to the parents to send their children to the religious schools. However, the religious schools, which constitute approximately 89% of the private schools in the city of Milwaukee, would greatly benefit from the amended MPCP. *See* Agreed Upon Statement of Facts, ¶ 25. Millions of dollars would pour into their coffers, greatly enriching their ability to fulfill their religious missions.

In addition, state payments to participating religious schools under the amended MPCP are not limited to the tuition actually charged by the schools. The parties have stipulated that the tuition charged by a majority of the religious schools is less than the amount of state payment they would receive under the amended MPCP. *See* Agreed Upon Statement of Facts, ¶ 30. The amended MPCP places no limitations on how the money may be used, including teachers salaries and operating expenses. *Reynolds* and *Warren* forbid the use of government funds for operating expenses by religious institutions. Every dollar paid by the government exceeding the actual tuition provides a direct and substantial benefit to the religious schools.

B. The Compelled Support Clause

Article I, sec. 18 reads in pertinent part: ". . . nor shall any person be compelled to . . . support any place of wor-

ship or to maintain any ministry, without consent . . ." The amended MPCP violates the compelled support clause because it compels Wisconsin taxpayers to support religious schools providing pervasively sectarian instruction rendering them places of worship and to maintain ministries without their consent.

We have already discussed how the Court held in *Weiss, supra*, that Bible readings in public schools violates the "benefit" and the "compelled support" clauses. The Court found reading a Bible in public schools to constitute "worship" and by permitting this activity in the schools, the schools became "place(s) of worship" within the meaning of Article I, sec. 18. *Weiss*, 76 Wis. at 211-13. Bible reading in the public schools violates the compelled support clause because taxpayers of the school district with different religious beliefs were "compelled to aid in the erection of the school building in question, and also to aid in the support of the school maintained therein." *Id.* "Being thus compelled to aid in such erection and support, they have a legal right to object to its being used as a 'place of worship.'" *Id.*

The amended MPCP also compels support of places of worship without the consent of taxpayers. Religious elementary and secondary schools are pervasively sectarian, usually including religious worship and teachings in their institutions. There can be no question that the parochial schools are places of worship.

Tax dollars will be used to support these schools. As stated earlier, no limitations are placed on the use of the government aid. The schools may use these funds as operating expenses, to purchase religious writing for intsruction, or other similar uses. *See* Agreed Upon Statement of Facts, ¶ 28.

Perhaps the most offensive part of the amended MPCP is it compels Wisconsin citizens of varying religious faiths

to support schools with their tax dollars that proselytize students and attempt to inculcate them with beliefs contrary to their own. We do not object to the existence of parochial schools or that they attempt to spread their beliefs through their schools. They just cannot do it with state tax dollars.

Accordingly, the amended MPCP, by permitting religious schools to participate in the program, violates Article I, sec. 18 of the Wisconsin Constitution because the primary effect of the amended MPCP is to benefit the religious missions of the elementary and secondary religious schools and because it compels Wisconsin taxpayers to support places of worship without their consent.

Private or Local Bill, Article IV, sec. 18

Article IV, sec. 18 states, "(n)o private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The purpose of this provision is:

1.) (T)o encourage the legislature to devote its time to the state at large, its primary responsibiilty;

2.) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and

3.) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Davis v. Grover, 166 Wis. 2d 501, 519, 480 N.W.2d 460 (1992); *Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health and Social Services*, 130 Wis. 2d 79, 107-08, 387 N.W.2d 254, 266 (1986). The legislature passed the amended MPCP as part of a voluminous budget bill. This reduces the legislature's accountability to the public and leaves the legislation susceptible to being challenged under Article IV, sec. 18. *See Davis v. Grover*, 166 Wis.

2d at 522. One of the principal concerns embodied in Article IV, sec. 18 is to avoid "internal logrolling" by the legislature. *Id.*, at 519, citing, *Brookfield v. Milwaukee Sewerage,* 144 Wis. 2d 896, 426 N.W.2d 591 (1988) (footnote omitted). "Multisubject bills by their nature are subject to a greater susceptibility of smuggling and log-rolling." *Id.* However, we realize that legislators may be forced by time constraints to pass legislation through multi-subject bills. *Id.* at 522. Therefore, this court has a duty to take a closer look at the legislation.

Determining whether the amended MPCP constitutes a private or local bill involves a two part analysis: 1.) whether the process in which the bill was passed deserves a presumption of constitutionality, and 2.) whether the bill is private or local. *Id.* at 520. If this court concludes that the amended MPCP constitutes a private or local bill, then Article IV, sec. 18 will apply, and the legislation must be passed as a single subject bill with the title clearly indicating the subject matter. *Id.*

First, this court must determine whether the process by which the amended MPCP was enacted deserves a presumption of constitutionality. "Although a statute generally enjoys a presumption of constitutionality, an exception to the rule occurs when the behavior of the legislature allegedly violates a law mandating the form in which bills must be enacted." *City of Oak Creek v. State Dep't of Natural Resources,* 185 Wis. 2d 424, 437, 518 N.W. 2d 276, 279 (Ct. App. 1994). *See, Davis v. Grover,* 166 Wis. 2d at 520. In this case, the amended MPCP was passed as part of the 1995 Budget Act instead of as a single subject bill. 1995 Wis. Act 27, sec. 4002-09. Furthermore, the amended MPCP portion of the 1995 Budget Act did not have a title clearly indicating its subject matter. Thus, the amended MPCP will only be presumed constitutional if evidence shows that the legislature adequately considered this legislation.

The original MPCP was law since 1990, and received a lot of attenion. When the legislature decided to amend the program, public hearings were held in Milwaukee, Madison, Cedarburg, Portgage, and River Falls. In addition, the Joint Committee on Finance debated the bill. Furthermore, the Assembly Committee on Urban Education and the Senate Education Committee held hearings regarding this legislation. This bill was also debated on the Assembly and Senate floor. Thus, this court concludes this legislation was not smuggled through the legislature by passing it as part of a voluminous budget bill.

Second, this court must determine whether the amended MPCP constitutes a private or local bill. There are three categories of legislation that can be challenged under the local bill provision. First, legislation that is specific on its face as to particular people, places or things. *See Davis,* 166 Wis. 2d at 524. Second, legislation that is not specific on its face, but involves prohibited classification under Article IV, sec. 31. *Id.* at 525. Third, legislation that is not specific on its face but creates a closed classification that limits it to a specific locality. *Id.* In this case, the amended MPCP falls within the third category, because it only applies to first class cities. At this time, Milwaukee is the only first class city in Wisconsin. Thus, we must analyze it under the test enunciated in *Brookfiield, supra.*

The elements of the *Brookfield* test are:

1. The classification employed by the legislature must be based on substantial distinctions which make one class really different from another;
2. The classification adopted must be germane to the purpose of the law;
3. The classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.

4. When a law applies to a class, it must apply equally to all members of the class.

5. The characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Brookfield, 144 Wis. 2d at 907-09. This test analyzes the substance of the legislation in order to determine whether the procedural requirements of the local bill provision apply. *See Davis*, 166 Wis. 2d at 526. In *Davis*, the court found that the original MPCP met all five elements. *Id.* at 527-37.[6] The parties dispute whether the program still meets the second element under the amended MPCP. No other element of the *Brookfield* test is at issue.

The plaintiffs contend the adopted classification of first class cities is no longer germane to the purpose of the law. When determining whether the first class city classification was germane to the purpose of the law under the original MPCP, the trial court, the court of appeals, and the Wisconsin Supreme Court in *Davis* concluded that "the only reasonable inference to be drawn from the MPCP was that it was an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Id.* at 530. The parties do not dispute that improving education in Wisconsin is of statewide importance, nor that a first class city is the best place to experiment with alternative forms of education. However, they do disagree on whether the amended MPCP still constitutes an experi-

[6] It is the rare opportunity to have a case to refer to which is almost entirely similar on the issues as *Davis v. Grover*. *Davis* is the predecessor of this case which, in part, addressed this issue. Hence, it behooves us to consider the Court's analysis in that case to determine whether the primary bases for its holding is present in this case.

ment. In *Davis,* the court focused on two features of the program to indicate its experimental nature: the small size of the program and the extensive data compilation and reporting requirements. *Id.* at 533-34. The plaintiffs contend the program no longer constitutes an experiment, because the amended MPCP substantially expanded the size of the program and severely reduced the data compilation requirements.

First, the *Davis* court stated, "the program is not an abandonment of the public school system. Rather, the MPCP would affect at most only 1 percent of the students in the MPS, giving the program a very small window of opportunity to test the effectiveness of an alternative to the MPS." *Id.* at 533. Since *Davis v. Grover* was decided, the program has expanded to include up to 15% of the students in the MPS. Allowing 15,000 students to participate in this program can no longer be considered "a small window of opportunity." Nonetheless, expanding the number of participating students and schools increases the state's ability to assess the effectiveness of educational choice and to evaluate different models. "The success of the program is dependent upon the participation of numerous and diverse nonsectarian private schools such that the fate of the program does not rest on the operations of one or a few schools." *Id.* at 534.

Second, the *Davis* court found that "the MPCP creates an extensive data compilation and reporting process which the state can use to measure the effects of choice and competition in education." *Id.* at 533. However, the amended MPCP eliminated sec. 119.23(5)(d), Stats., which required the superintendent to prepare and circulate "a report comparing the academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled and parental involvement activities" of pupils participating in the MPCP with those attending public schools in Milwaukee. 1995

Wis. Act 27, sec. 4007m. The amended MPCP also eliminated sec. 119.23(9)(a), Stats., which authorized the superintendent to "conduct one or more financial or performance evaluations, audits, or both." Section 119.23(9), Stats., is the only remaining evaluative component of the MPCP. This statute requires the legislative audit bureau to conduct a financial and performance evaluation audit of the program by January 15, 2000 to submit to the chief clerk of each house of the legislature. *Id.*

Without regular evaluation of the MPCP, this court questions its experimental nature. Experiments are executed to test a certain hypothesis. However, how can the state test the hypothesis that choice improves education without providing for routine and systematic data collection and compilation? No provision in the amended MPCP is provided to enable the state to make meaningful comparisons between students who participate in this program with those attending public schools. The primary provision for such data compilation and comparison was repealed by the amended MPCP, sec. 119.23(5)(d), Stats. Thus, this court finds that the amended MPCP is no longer an experiment. The legislature, by repealing sec. 119.23 (5)(d), Stats., eliminated one of the two principal bases upon which the *Davis* court relied in finding the Original MPCP constitutional under Article IV, sec. 18.

Furthermore, this court is not aware of any other features of the amended MPCP that make the first class city classification germane to the purpose of the law. We agree that a first class city is the best place to test experimental forms of education. However, if the program is no longer experimental, it will not benefit children outside of Milwaukee. The existence of so many private schools in the City of Milwaukee becomes completely irrelevant if no significant data compilation system exists. Thus, it no longer serves a statewide purpose, and is no longer "ger-

mane to the purpose of the law." Therefore, this court finds the amended MPCP is a local or private bill enacted in violation of Article IV, sec. 18.

Public Purpose Doctrine

Another challenge to the constitutionality of the amended MPCP involves the application of the public purpose doctrine. The public purpose doctrine states that public expenditures may be made only for public purposes. "An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin." *See State ex rel. Warren v. Nusbaum*, 59 Wis. 2d at 414. Although the public purpose doctrine is not an express provision of the Wisconsin Constitution, it is firmly accepted as a basic constitutional tenet. *See State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683, 684 (1967).

Several theories exist regarding the origin of the public purpose doctrine. The Wisconsin Supreme Court has attributed its development to the due process and equal protection clauses of the state and federal constitutions. *See State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 175, 277 N.W. 278 (1938). In *Heimerl v. Ozaukee County*, 256 Wis. 151, 158, 40 N.W.2d 564, 567 (1949), the Wisconsin Supreme Court attributed it to U.S. Const. art. IV, sec. 4 stating, "(t)axation for the private purpose is prohibited by the clause of the federal constitution that guarantees to every state a Republican form of government, as such a form of government forbids the raising of taxes for anything but a public purpose." Furthermore, Wis. Const. Article VIII, sec. 2, provides that no money shall be paid out of the treasury except in pursuance of an appropriation by law. *See State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 147 N.W.2d 304 (1967). Finally, others trace the doctrine to a "judicial articulation of the belief that governmental power should be used for the benefit of the entire

community." *See* Lewis R. Mills, *The Public Purpose Doctrine in Wisconsin*, 1957 Wis. L. Rev. 40, 40.

The difficulty arises in determining what constitutes a valid public purpose. "(W)hat constitutes a public purpose is in the first instance a question for the legislature to determine and its opinion should be given great weight." *State ex rel. Warren v. Reuter*, 44 Wis. 2d at 212. The court must recognize that "the hierarchy of community values is best determined by the will of the electorate" and that "legislative decisions are more representative of popular opinion because individuals have greater access to their legislative representatives." *Barczak*, 34 Wis. 2d at 65. Thus, the court "will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use." *Id.* at 64.

Furthermore, what constitutes a public purpose is not a static concept. *Id.* Over time, the scope of activities which may be classified as a valid public purpose has broadened. *See State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 54, 205 N.W.2d 784, 797 (1973). In *La Plante*, the following cases were cited to illustrate the steady growth of the public purpose doctrine under the decisions of the Wisconsin Supreme Court.

> In *State ex rel. Bowman v. Barczak, supra*, industrial development through agencies and bond issues, pursuant to sec. 59.071, Stats., was determined to be a valid constitutional enactment as it related to a declaration of public purpose. In *West Allis v. Milwaukee County*, 39 Wis. 2d 356, 159 N.W.2d 36 (1968), construction of incinerators and waste disposal facilities was considered a public purpose. In *State ex rel. Warren v. Reuter, supra*, financial aid to Marquette School of Medicine, a private non-

> profit corporation, was upheld upon the premise that public health is a public purpose.

Id. at 55.

The amended MPCP is similar to the original MPCP which was challenged in *Davis v. Grover*. In *Davis*, the Wisconsin Supreme Court held that the original MPCP did not violate the public purpose doctrine. *Id.* at 546. Thus, this court will begin by looking at the holding in that case.

In *Davis*, the court stated, "(n)o party disputes that education constitutes a valid public purpose, nor that private schools many be employed to further that purpose." *See id.* at 541. Thus, the only dispute between the parties was whether adequate controls existed to ensure the attainment of the public purpose.

The Wisconsin Supreme Court found that adequate controls did exist under the original MPCP. The court held that "(i)t simply does not matter how the school spends the money so long as it gives the participating student an education that complies with sec. 118.165, Stats., in return for the money." *Id.* at 542. Section 118.165, Stats., requires private schools to:

1.) be organized to primarily provide private or religious-based education;

2.) be privately controlled;

3.) provide at least 875 hours of instruction each school year;

4.) provide a sequentially progressive curriculum of fundamental instructions in reading, language arts, mathematics, social studies, science, and health;

5.) not be operated or instituted for the purpose of of avoiding or circumventing compulsory school attendance; and

6.) have pupils return home not less than two months of each year unless the institution is also licensed as a child welfare agency.

The court further cited the additional reporting requirements included in the program. They noted that the state superintendent had to prepare an annual report for the legislature which compared data on children who participated in the original MPCP with students who attended Milwaukee public schools in the following areas: academic achievement, daily attendance, percentage of dropouts, and percentage of pupils suspended and expelled. *Id.* at 544. Detailed reports and evaluations were also generated by the program. The original MPCP authorized the state superintendent and required the Legislative Audit Bureau to conduct financial and performance audits on the program. *Id.*

Finally, the court recognized the importance of parental choice in controlling the education received by students participating in the original program. The court stated:

> Parents generally know their children better than anyone. The program allows participating parents to choose a school with an environment that matches their child's personality, with a curriculum that matches their child's interest and needs, and with a location that is convenient. If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere. In this way, parental choice preserves accountability for the best interests of the children.

Id.

In *Davis*, the court compared the original MPCP to the situation in *Reuter*. *Id.* at 542. In that case, the court upheld an appropriation of public funds to Marquette Medical School for the purpose of providing quality medical education in Wisconsin. *Id.* However, Marquette Medical School was required to use the funds for "medical education, teaching, and research." *Id.* Under the original

MPCP, sec. 119.23 Stats., did not provide any requirements on how the funds provided to the participating schools had to be spent. *Id.* Nonetheless, the court found there was adequate control since the schools were required to provide an education complying with the statutory requirements for private schools. *Id.* The court also addressed the challenge that the Marquette Medical School was "accredited by an independent national organization as well as federal and state agencies" while schools participating in the original MPCP were not required to demonstrate that they were providing quality education. *Id.* The court found that the requirements of the program along with parental choice provided adequate controls.

In *Davis*, the court used a two step analysis to determine whether the public purpose doctrine had been violated: 1.) whether there was a valid public purpose and 2.) if so, whether there was adequate control and accountability to ensure the attainment of the public purpose. *Id.* at 540-45. This court will begin by applying the same analysis to the amended MPCP.

First, "(n)o party disputes that education constitutes a valid public purpose, nor that private schools may be employed to further that purpose." *Id.* at 541. The only relevant change under the amended MPCP is the addition of sectarian schools. Nonetheless, all participating children still receive an education. "We cannot take the short rather than the long view of the problem because a private school is used as a means to attain the end." *State ex rel. Warren*, 44 Wis. 2d at 214. Indeed, expanding the MPCP enhances this public purpose by allowing more students to participate in the program.

Secondly, this court must consider whether there are adequate controls to ensure the attainment of the public purpose. The amended MPCP eliminated some of the reporting requirements. However, "(o)nly such control and accountability as is reasonably necessary under the circum-

stances to attain the public purpose is required." *Id.* at 216. In *Davis*, the court found that reasonable controls existed. This court finds that adequate controls still exist.

Under the original MPCP, there were no express limitations on the use of the funds paid to the participating schools. The Wisconsin Supreme Court held that "(i)t simply does not matter how the school spends the money so long as it gives the participating student an education that complies with sec. 118.165, Stats., in return for the money." *Davis* at 542. Under the amended MPCP the participating schools must still comply with sec. 118.165, Stats., which ensures a sequentially progressive curriculum. Ensuring a sequentially progressive curriculum ensures the attainment of the public purpose.

In addition, the amended MPCP still contains several reporting requirements. The amended MPCP eliminated sec. 119.23(5)(d) Stats., requiring the state superintendent to submit an annual report to the legislature comparing students participating in the program with students attending Milwaukee public schools. It also eliminated the state superintendent's authority to conduct financial and performance audits under sec. 119.23(9)(a) Stats. However, these reporting requirements are unnecessary to ensure the attainment of the public purpose. The court's only concern is that the controls ensure that participating students receive an education. Participating schools must still submit to an annual independent financial audit under sec. 119.23(7), Stats. Furthermore, the legislative audit bureau must submit a fiancial and performance audit of the program to the chief clerk of each house of the legislature, for distrbution to appropriate standing committees, by January 15, 2000 under sec. 119.23(9)), Stats.

Finally, parental choice still exists. The theory behind this program is that "less bureaucracy coupled with parental choice improves educational quality" since "parental choice preserves accountability for the best interests of the

children." *Davis* at 544-45. Wisconsin recognizes that parents are "the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligation to give to such children proper nurture, education, and training." *See Wisconsin Indus. Sch. for Girls v. Clark County*, 103 Wis. 651, 668-69, 79 N.W. 422, 428 (1899).

Under the analysis used in *Davis*, education still constitutes a valid public purpose, and adequate controls still exist. However, there are times when using the traditional framework is unnecessary. The amended MPCP uses both sectarian and nonsectarian schools to educate participating students. Clearly the legislature may use private institutions to achieve a public purpose. Nonetheless, the religious education provided by the participating sectarian schools does not serve a valid public purpose. Using sectarian schools to provide religious education with public money so blatantly violates the public purpose doctrine that it requires this court to go outside the traditional analysis.

The legislature has wide discretion to determine what constitutes a public purpose, but the constitution clearly calls for a separation of church and state. "(T)he constitutional question remains as to how far the court should go in deferring to the conclusions of the legislature." *Barczak*, 34 Wis. 2d at 65. When leigslation is challenged, the court has an "unavoidable burden under the constitution to examine such legislation and to assess its realistic operations." *Id.* at 65-66, quoting *David Jeffrey Co. v. Milwaukee*, 267 Wis. 559, 578, 66 N.W.2d 362 (1954). "Although the legislative declarations are entitled to great weight, we may not blindly accept at full value even the most elaborate prefatory expressions concerning community need, economic impact, or public purpose." *Id.*

Normally "(w)e are not concerned with the 'wisdom, merits or practicability of the legislature's enactment.'"

See Millers Nat'l Ins. Co. v. City of Milwaukee, 184 Wis. 2d 155, 175, 516 N.W.2d 376, 383 quoting *Hopper v. Madison*, 79 Wis. 2d 120, 128-29, 256 N.W.2d 139 (1977). In reviewing a "legislative expenditure of public funds, there is a strong presumption that a legislature's acts are constitutional, and it is the duty of this court, if possible, to construe a legislative enactment as to find it in harmony with constitutional principals." *See Id.* However, the legislature exceeded their role by funding religious education with public funds, and this court can not defer to the legislature's expression of public purpose.

Sectarian schools make up the majority of the participating schools in the amended MPCP. During the 1994-95 school year, 84% of the participating students attended religious schools. Education in sectarian schools contain two components: 1.) secular instruction and 2.) religious instruction. The mission statements of the religious schoools clearly indicate that their function is to promote religion. Secular instruction in these schools intertwines worship and religious indoctrination designed to advance their religious goals. Furthermore, most schools receive more than they charge for tuition, and there are no restrictions on how the schools spend this money. Thus, public money inevitably goes to fund religious education and activities.

The public purpose doctrine clearly states that public funds may "only" be used for public purposes. Granted, the public purpose doctrine does not include an establishment clause component. Nevertheless, there are no cases upholding government funding of religious activities as a valid public purpose.

> The test to be applied in determining whether a particular agency may be employed by the state or some particular subdivision thereof by legislative authorization, to perform any particular work, is not whether the agency is public, but whether the purpose

> is public within the legitimate function of our constitutional government. If the purpose be public and constitutional, and the agency be an appropriate means to accomplish it, and not expressly or by necessary implication prohibited by state or national constitution, its employment, under reasonable regulations for control and accountability to secure public interests, is legitimate and constitutional.

See Wisconsin Indus. Sch. for Girls, 103 Wis. at 667. The fact that the establishment clause and Article 1, sec. 18 make funding religious activities with public money unconstitutional leads to the conclusion that sectarian schools providing religious education can not be used to achieve the public purpose of educating students.

Using the traditional analysis, the amended MPCP remains constitutional under the public purpose doctrine. This holds true for nonsectarian schools. However, religious education does not constitute a valid public purpose. Thus, the use of sectarian schools is unconstitutional under the public purpose doctrine.

Uniformity Clause, Article X, sec. 3

The amended MPCP has been challenged as violating the uniformity clause, Article X, sec. 3. The uniformity clause provides:

> (t)he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Article X, sec. 3. This court will apply a two step analysis to determine whether the uniformity clause has been violated: 1.) whether participating schools are district schools, and 2.) if so, whether the character of instruction is uniform.

The first issue revolves around the definition of "district school." The Wisconsin Constitution does not specifically define the term "district school." We can look to the intent of the framers of the Wisconsin Constitution, but defining what constitutes a district school did not appear to be their primary concern.

> An examination of the debates in the conventions that framed our present constitution and the constitution of 1846 (which contained a similar provision) discloses that the members of those conventions, when they were framing the article relating to schools, were concerned, not with the method of forming school districts, but with the character of instruction that should be given in those schools after the districts were formed,—with the training that these schools should give to the future citizens of Wisconsin.
>
> Viewing the terms of this constitutional provision in light of its express terms as well as of the purpose which actuated those who drafted it, we conclude that the requirement as to uniformity applies to the districts after they are formed,—to the character of the instruction given,—rather than to the means by which they are established and their boundaries fixed.

See Kukor v. Grover, 148 Wis. 2d 469, 486, 436 N.W. 2d 568, 575 (1989), *citing, State ex rel. Zilisch v. Auer,* 197 Wis. 284, 289-90, 223 N.W. 123 (1928).

Furthermore, in *Davis,* the court clearly rejected the theory that any school that accepts public money becomes a district school. *Davis,* at 539-40. The court stated:

> This theory flies directly in the face of past decisions by this court. In *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 170 N.W.2d 790 (1969), we held that the appropriation of public funds to a private entity need only be accompanied by such controls as are necessary to fulfill the public purpose required. Depending on the circumstances, these controls do not necessarily have to be the same as those regulating similar public agencies.

Id. Thus, participating schools are not automatically district schools.

The amended MPCP is similar to the original MPCP which was challenged in *Davis*. *Id.* In that case, the Wisconsin Supreme Court found that the original MPCP did not violate the uniformity clause. *Id.* at 539. This court will look at the analysis used in that case.

In *Davis*, the court held that participating schools were not required to provide uniform education, because they did not constitute district schools for the purpose of the uniformity clause. *Id.* at 538. The court noted that the original MPCP unambiguously referred to "private schools" which has a specific statutory meaning. *Id.* at 538. Section 15.001(3r), Stats., defines a private school as "an institution with a private educational program that meets all of the criteria under s. 118.165(1) or is determined to be a private school by the state superintendent under s. 118.167." In deciding this issue, the Wisconsin Supreme Court stated, "(w)e assume that the legislature was aware of this statutory meaning and intended to use 'private school' . . . as a stautory term of art." *Davis* at 538.

Furthermore, in *Davis*, the court determined that the original MPCP did not deprive any student of the opportunity to attend a public school providing uniform education. *Id.* at 538. They cited to the fact that all students participating in the program have the option to

"withdraw at any time and return to a public school." *Id.* The court concluded that the original MPCP merely reflected "a legislative desire to do more than that which is constitutionally mandated." *Id.*

The court has clearly established the principal that the uniformity clause creates a floor and not a ceiling for legislative action. *See, e.g., Zweifel v. Joint Dist. No. 1, Belleville,* 76 Wis. 2d 648, 251 N.W.2d 822 (1977). In *Davis,* the court looked at the following cases to illustrate this point. *Davis* at 538. In *Comstock v. Joint Sch. Dist. No. 1,* 65 Wis. 631, 636-37, 27 N.W. 829 (1888), the Wisconsin Supreme Court found a statute allowing school districts to admit nonresident school children constitutional under the uniformity clause. The court declared, "when the legislature has provided for each such child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with." *Id.* Furthermore, in *Kukor,* the Wisconsin Supreme Court found that a legislative formula used to determine the amount of state aid to public school districts was constitutional under the uniformity clause, because the students had the opportunity to attend public school providing uniform instruction. *Kukor* at 496-97.

This court must follow the reasoning applied in *Davis,* unless the amended MPCP can be clearly ditinguished from the original MPCP. However, little has changed from the original MPCP with respect to the uniformity clause.

Choice opponents argue the schools participating in the amended MPCP no longer constitute district schools since the legislature significantly expanded the program. Instead of being a small, experimental program, choice opponents claim that private schools are becoming a significant and integral part of the required system. That may be so, but it is irrelevant under the *Davis* analysis. The legislature still refers to the participating schools as "private schools" which still has a specific statutory defi-

nition. The amended MPCP does not change this language in any way. Even where private schools are created by an act of the legislature, they remain private as long as the institution retains control. *See Attorney General ex rel. Saunders v. Albion Academy & Normal Institute*, 52 Wis. 469, 9 N.W. 391 (1881). Under the amended MPCP, ownership and control has not been transferred to the state.

In addition, students may still withdraw at any time to return to public schools. The uniformity clause does not require the legislature to ensure that all children in Wisconsin actually receive a free uniform basic education. *Davis* at 538. The legislature must merely ensure that all children have the opportunity to receive a free uniform basic education, and the amended MPCP in no way prevents this. *Id.* Once the legislature meets this requirement, they are free to add to the basic foundation required by the uniformity clause. *Id.* at 539.

Choice opponents further cite to the fact that private schools may now receive all of their funding through public money just like any other district school that must comply with the uniformity clause. As the program was originally enacted, no school could receive more than half of its funds from the state. This restriction was repealed. Nonetheless, the notion that schools receiving public money are transformed into district schools was clearly rejected in *Davis. Id.*

The 1995 amendments to the MPCP do not change the analysis applied to the original MPCP. Thus, this court finds no compelling reason to depart from the holding in *Davis.* Schools participating in the amended MPCP are not district schools so they are not required to provide uniform education nor restricted from providing sectarian instruction. Therefore, the amended MPCP does not violate the uniformiy clause, Article X, sec. 3.

CONCLUSION

For the above reasons this court holds that the amended MPCP violates Article I, sec. 18, Article IV, sec. 18, and the private purpose doctrine as applied to the sectarian schools. The amended MPCP is constitutional under Article X, sec. 3 and the private purpose doctrine as applied to nonsectarian schools. Summary judgment is granted in favor of plaintiffs and the State of Wisconsin is ordered to terminate the amended Milwaukee Parental Choice Program accordingly. By stipulation this order is stayed until the close of the 1996-97 school year.

Dated: January 15, 1997.

BY THE COURT:

/s/ Paul B. Higginbotham
PAUL B. HIGGINBOTHAM
Circuit Judge

This opinion was written with the assistance of Jennifer Hanneman

APPENDIX D

[Filed Mar 29,1996]

IN THE SUPREME COURT
STATE OF WISCONSIN

No. 95-2153-OA

STATE OF WISCONSIN EX REL. TOMMY G. THOMPSON, GOVERNOR, STATE OF WISCONSIN,
Petitioner,

JOHN T. BENSON, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION AND JAMES E. DOYLE, ATTORNEY GENERAL,
Necessary-Parties,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES, PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,
Necessary-Parties-Intervening-Petitioners,

REP. ANNETTE POLLY WILLIAMS,
Intervenor-Petitioner,

v.

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISSAC SEROTTA, CEILANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER,

COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES, PHILIP JONES, MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, BY ITS PRESIDENT, M. CHARLES HOWARD, MICHAEL LANGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., BY ITS EXECUTIVE DIRECTOR, CARL A. GOBEL, PEOPLE FOR THE AMERICAN WAY, BY ITS EXECUTIVE VICE PRESIDENT AND LEGAL DIRECTOR, ELLIOTT M. MINCBERG, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN AND SALLY F. MILLS,

Respondents.

PER CURIAM. The court is equally divided. Chief Justice Day, Justice Abrahamson and Justice Bablitch believe that the amendments to the Milwaukee Parental Choice Program (MPCP) are contrary to art. 1, § 18 and art. X, § 3 of the Wisconsin Constitution.[1]

Justice Steinmetz, Justice Wilcox and Justice Geske believe, based both upon the legislation before us and the stipulated facts, that respondents have not met the burden to prove beyond a reasonable doubt that the legislative amendments to MPCP violate the Establishment Clause of the First Amendment to the U.S. Const., art. I, § 18 of the Wis. Const., art. X, § 3 of the Wis. Const. or Wisconsin's Public Purpose Doctrine.[2]

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[1] Because these three justices would hold the expanded MPCP program unconstitutional under the Wisconsin Constitution, they would not reach the issue of whether it should also be found unconstitutional under the United States Constitution.

[2] The original program withstood challenges brought on a variety of state constitutional bases in *Davis v. Grover*, 166 Wis. 2d 501, 512, 480 N.W.2d 460 (1992), in part because the majority of this court concluded that the program was experimental in nature and served to advance the goal of improving "the quality of education in Wisconsin for children of low-income families." Justices Stein-

A majority of the participating judges must agree on a particular point for it to be considered the opinion of the court. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995). Conversely, when the court splits evenly, as is the case here, the court would ordinarily affirm the court of appeals' decision if the case was before the court on appeal, or remand to the court of appeals for further proceedings if the case was before the court on a bypass or certification. *Id.* at 684-85. This case, however, is not before the court on appeal, bypass or certification but rather as an original action pursuant to a petition for removal from the Dane County Circuit Court.

Accordingly, the stay of proceedings pending in the Dane County Circuit Court is lifted; the preliminary injunction enjoining all portions of the amended MPCP is continued until further order of the Dane County Circuit Court; and the original action proceeding pending before this court is dismissed without prejudice.

ANN WALSH BRADLEY, J., did not participate.

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metz, Wilcox and Geske believe that while the legislature has chosen to expand the program in the amendments challenged here, the program is still limited and experimental and, under the stipulated facts, remains inoffensive to the dictates of the United States Constitution, the Wisconsin Constitution and the Wisconsin Public Purpose Doctrine.

APPENDIX E

WEST'S WISCONSIN STATUTES ANNOTATED
SCHOOLS
CHAPTER 119. FIRST CLASS CITY SCHOOL SYSTEM

Current through 1995 Act 135, published 1/5/96

119.23. Milwaukee parental choice program

(1) In this section, "membership" has the meaning given in s. 121.004(5).

(2)(a) Subject to par. (b), beginning in the 1990-91 school year, any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any private school located in the city if all of the following apply:

1. The pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget.

2. In the previous school year the pupil was enrolled in the school district operating under this chapter, was attending a private school under this section, was enrolled in grades kindergarten to 3 in a private school located in the city other than under this section or was not enrolled in school.

3. The private school notified the department of its intent to participate in the program under this section by May 1 of the previous school year. The notice shall specify the number of pupils participating in the program under this section for which the school has space.

4. The private school complies with 42 USC 2000d.

5. The private school meets all health and safety laws or codes that apply to public schools.

(b) In the 1995-96 school year, no more than 7% of the school district's membership may attend private schools under this section. Beginning in the 1996-97 school year, no more than 15% of the school district's membership may attend private schools under this section.

(3)(a) The pupil or the pupil's parent or guardian shall submit an application, on a form provided by the department, to the participating private school that the pupil wishes to attend. Within 60 days after receiving the application, the private school shall notify the applicant, in writing, whether the application has been accepted. The department shall ensure that the private school determines which pupils to accept on a random basis, except that the private school may give preference in accepting applications to siblings of pupils accepted on a random basis.

(b) If the private school rejects an applicant because it has too few available spaces, the pupil may transfer his or her application to a participating private school that has space available.

(4) Upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the department shall pay to the parent or guardian, from the appropriaton under s. 20.255(2)(fu), an amount equal to the total amount to which the school district is entitled under s. 121.08 divided by the school district membership, or an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department, whichever is less. The department shall pay 25% of the total amount in September, 25% in November, 25% in February and 25% in May. The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school.

(5) The department shall:

(a) Annually reduce the aid paid to the board under s. 121.08 by an amount determined as follows:

1. Divide the total amount to which the school district is entitled under s. 121.08 by the school district membership.

2. Multiply the quotient under subd. 1 by the number of pupils attending private schools under this section.

(b) Ensure that aid paid to other school districts under s. 121.98 is neither reduced nor increased as a result of the payments under sub. (4) or the reduction in aid to the board under par. (a) and that the amount of the aid reduction under par. (a) lapses to the general fund.

(c) Ensure that pupils and parents and guardians of pupils who reside in the city are informed annually of the private schools participating in the program under this section.

(d) Repealed by 1995 Act 27, § 4007m, eff. July 29, 1995.

(6) The board shall provide transportation to pupils attending a private school under this section if required under s. 121.54 and may claim transportation aid under s. 121.58 for pupils so transported.

(7)(a) Each private school participating in the program under this section shall meet at least one of the following standards:

1. At least 70% of the pupils in the program advance one grade level each year.

2. The private school's average attendance rate for the pupils in the program is at least 90%.

3. At least 80% of the pupils in the program demonstrate significant academic progress.

4. At least 70% of the families of pupils in the program meet parent involvement criteria established by the private school.

(am) Each private school participating in the program under this section is subject to uniform financial accounting standards established by the department and annually shall submit to the department an independent financial audit of the private school.

(b) The department shall monitor the performance of the pupils attending private schools under this section. If the department determines in any school year that the private school is not meeting at least one of the standards under par. (a), that private school may not participate in the program under this section in the following school year.

(c) A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities.

(8) There is created a pupil assignment council composed of one representative from each private school participating in the program under this section. Annually by June 30, the council shall make recommendations to the participating private schools to achieve, to the extent possible, a balanced representation of pupils participating in the program under this section.

(9) The legislative audit bureau shall perform a financial and performance evaluation audit on the program under this section. The bureau shall submit copies of the audit report to the chief clerk of each house of the legislature for distributon to the appropriate standing committees under s. 13.172(3) by January 15, 2000.